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Supreme Court of the United States

OCTOBER TERM, 1969

Docket No. 725

JOSEPH F. SCHIPANI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	5
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	9
STATEMENT OF THE CASE	10
1. Introductory	10
2. The Electronic Taint Factor And The Second Trial	12
3. The Second Trial Proofs As Such (Consisting Of A Re-Incorporation Of The First-Trial Proofs Into The Second-Trial Record Except For Proof Of Likely Source)	42
REASONS FOR GRANTING THE WRIT	42
CONCLUSION	60
APPENDIX:	
A—Opinion of the United States Court of Appeals	1a
B—Opinion of the United States District Court (May 10, 1968, Weinstein, D.J.)	13a
C—Opinion of the United States District Court (July 26, 1968, Weinstein, D.J.)	21a
D—Memorandum and Order of the United States District Court (October 14, 1968, Weinstein, D.J.)	71a

PAGE

E—Opinion of the United States District Court (November 8, 1968, Weinstein, D.J.) 74a

F—Supplemental Memorandum for the United States 92a

G—Memorandum of James D. O'Brien, November 18, 1966 ..... 98a

H—Judgment of Court of Appeals Affirming Conviction 108a

I—Order of Court of Appeals Denying Motion Under 28 U.S.C. §1651 ..... 110a

Cases Cited

Alderman v. United States, 394 U. S. 165 ..... 8, 58

Black v. United States, 385 U. S. 26, decided November 7, 1966) 29, 30

Desist et al. v. United States, no. 12, Oct. Term 1968 57

Linkletter v. Walker, 381 U. S. 618, 629 27

Schipani v. United States, 385 U. S. 372, decided December 12, 1966) 10, 12

United States v. Massei, 355 U. S. 595 11

United States v. Ohio Power Co., 353 U. S. 98, 99 44

United States v. Schipani, 362 F. 2d 825 (C. A. 2, 1966) 10

United States Constitution Cited

Fourth Amendment 9, 30

Fifth Amendment 9

Sixth Amendment 9

Ninth Amendment 9

PAGE

Statutes Cited

26 U.S.C. §7201 ..... 9, 10
28 U. S. C. §518 43
28 U.S.C. §1254(1) 4
28 U.S.C. §1651 ..... 2, 4, 6, 9, 59, 60

Other Authorities Cited

19 A. L. R. 3d 502 49

87 A. L. R. 2d:
Page 271 49
Page 276 49
Page 280 49

5 Am. Jur. 2d:
Sec. 744 49
Sec. 989 49
Pages 188 et seq. 49
Pages 417-418 50

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Petitioner, Joseph F. Schipani, prays that a writ of certiorari issue to review the judgment, and an accompanying order, of the United States Court of Appeals for the Second Circuit, hereinafter described.

Opinions Below

The opinion of the Court of Appeals affirming petitioner's conviction (on this second trial under the same indictment), printed as Appendix A hereto, *infra,* is not yet reported. The Court of Appeals did not write an

opinion in connection with its accompanying order denying relief against the District Judge under 28 U. S. C. §1651 (the "All Writs" statute). The opinion of the District Court of May 10, 1968, denying the Government's motion to withdraw its consent to a trial without a jury, printed as Appendix B hereto, *infra*, is reported in 44 F.R.D. 461. The opinion of the District Court, of July 26, 1968, on the defense motion to suppress electronically obtained evidence, printed as Appendix C hereto, *infra*, is reported in 289 F. Supp. 43. The memorandum and order of the District Court, of October 14, 1968, disposing of various defense motions to strike or suppress evidence, printed as Appendix D hereto, *infra*, is not reported. The opinion of the District Court, of November 8, 1968, finding the defendant guilty of tax evasion, printed as Appendix E hereto, *infra*, is reported in 293 F. Supp. 156. On the first trial of this indictment an opinion was written by the Court of Appeals, reported in 362 F. 2d 825, reversed 385 U. S. 372; and by the District Court, not reported; both of the latter opinions were printed in the separately bound Appendix to the petition or certiorari in No. 504, Oct. Term 1966.

Jurisdiction

The judgment of the Court of Appeals affirming petitioner's conviction was entered on August 11, 1969. The time for filing this petition for certiorari has been extended, by order of Mr. Justice Harlan, to and including October 10, 1969. At the oral argument in the Court of Appeals on June 25, 1969 the Court entertained a motion by the appellant (the present petitioner) for relief pursuant to 28 U. S. C. §1651 (the "All Writs" statute), which sought mandamus, prohibition or other appropriate writ with reference to our contention that the Dis-

trict Court had exceeded its jurisdiction in the manner in which it dealt with an order of this Court which had reversed Schipani's first conviction on grounds of electronic taint and had remanded the case to the District Court "for a new trial should the Government seek to prosecute peititioner anew" (385 U. S. 372). Our latter motion in the Court of Appeals for relief under 28 U. S. C. §1651 was captioned by us under the same title and docket number as the appeal from Schipani's second conviction. At the conclusion of the oral argument on June 25, 1969 the Court of Appeals denied our said motion in open Court. Thereafter, on August 11, 1969 the Court of Appeals affirmed the second conviction, as above stated. We (counsel herein) did not find out until October 9, 1969, when we examined the certified record in the office of the Clerk of the Court of Appeals, that our motion under 28 U. S. C. §1651 had been re-entitled and had been given a new docket number by that Clerk, and that a separate order denying the motion had been entered under that new title and new docket number on June 25, 1969.* We were under the impression that the Court of Appeals' judgment of August 11, 1969 affirming the conviction would also operate as the order denying our motion under 28 U. S. C. §1651. Therefore, we have never filed a separate petition for certiorari in connection with the §1651 motion, nor have we applied for an extension of time to file such a separate petition for certiorari; and the ninety days allowed for certiorari to review a §1651 proceeding expired herein on September 23, 1969. When

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* The Clerk had re-entitled the case as Joseph F. Schipani, Petitioner v. Hon. Jack B. Weinstein, United States District Judge for the Eastern District of New York, Respondent, Docket No. 33753.

we requested and received from Mr. Justice Harlan the extension of time until October 10, 1969 to file this petition for certiorari we made no separate mention of the §1651 aspect; that application for extension of time was mailed on August 28, 1969, and Mr. Justice Harlan's order granting the extension is dated September 4, 1969, all of which was well before September 23, 1969 when the time for a separate certiorari petition in the §1651 proceeding expired. As will appear, *infra,* the §1651 aspect of this case is—under our theory of the case—inseparably integral with the proceedings under the indictment which are here sought to be reviewed. We also note that this Court has original jurisdiction under 28 U. S. C. §1651; and that the very subject matter of our within §1651 motion is that we allege a violation of a mandate of this Court by a Federal District Court in this same criminal prosecution. In any event furthermore, the same issues raised by our §1651 motion are involved in the present certiorari application to review the judgment of conviction as such. For all the above reasons we pray that the Court entertain jurisdiction, *via* this petition for certiorari, of the order of the Court of Appeals denying our §1651 motion.*

The jurisdiction of this Court is invoked under 28 U. S. C. §§1254(1) and 1651.

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* In order to perfect our jurisdictional position in regard to the §1651 motion we shall shortly file a separate motion for leave to file an original §1651 motion in this Court, and for consolidation of such original motion with the present petition for certiorari.

Questions Presented

At the October 1966 Term this Court, after first denying certiorari to review petitioner Schipani's conviction for income tax evasion (385 U. S. 934), about a month later granted the petition and vacated the conviction "upon the suggestion of the Solicitor General and upon an independent examination of the case", because of electronic taint (385 U. S. 372). The Court remanded the case to the District Court "for a new trial should the Government seek to prosecute petitioner anew" (*ibid*). In the Solicitor General's memorandum which had led to this result, it was stated that, "Since there was material evidence against petitioner which was tainted, his conviction cannot stand, and no purpose would be served here in having the District Court conduct a collateral hearing, such as was suggested by the Government in its memorandum in *Black.*" Early in 1968 a "trial attorney" of the Department of Justice in Washington filed an affidavit in the District Court stating that the Solicitor General had been "in *error,* when he informed the United States Supreme Court that 'Since there was material evidence against petitioner which was tainted, his conviction cannot stand * * *' ". The District Court then held a hearing on the electronic issues, in which the Government contended that the entirety of the first-trial proofs (which this Court had found tainted) be again admitted in evidence at a re-trial of Schipani. The District Court ruled that all proof of "likely source" of income (under the "net worth" theory) must be suppressed for electronic taint, but that all the rest of the Government's first-trial "net worth" proofs could be used anew. Schipani was then tried and convicted a second time without any new proofs whatsoever beyond the first-trial proofs which this

Court had condemned as electronically tainted and which the Solicitor General had disowned for the same reason. The Court of Appeals affirmed the second conviction and approved of the District Court's handling of this Court's mandate. The questions are:

1. Were the second-trial proceedings repugnant to the mandate of this Court? If the Government thought the Solicitor General had been "in error", which necessarily must mean also that the Government thought this Court's own "independent examination of the case" was likewise "in error", was not the required procedure a petition by the Government for re-hearing in this Court to reconsider the allegedly "erroneous" 1966 decision vacating the first conviction?

2. Was not the District Court's function in applying this Court's 1966 mandate limited to conducting a second trial, if the Government wanted one, in which the Government would either produce an entirely new body of proof or at least some substantial new proof wholly unconnected with the electronic-tainting activities condemned by this Court on the first-trial record? Did this Court intend or contemplate that the District Court would in effect collaterally review this Court's 1966 finding that the first-trial proofs were tainted? Again, should not any such re-examination of this Court's 1966 finding have been made only by this Court itself, upon a proper application by the Government for rehearing or other reconsideration in this Court?

3. Should not the Court of Appeals have reversed the second conviction and granted our motion for relief under 28 U. S. C. §1651 for the reasons denoted in questions 1 and 2, *supra*?

4. In view of the District Court's finding that the electronic taint did require suppression of all proof of "likely source", and in view of the fact that undisputedly the Government's attention became focused on petitioner Schipani as a tax-evasion defendant because of his alleged "organized crime" involvements and income sources, and in view also of the fact that the Government's undisputed electronic activities *re* Schipani and his alleged associates were part and parcel of this governmental preoccupation with "organized crime" in general and Schipani in particular, and in view of the fact also that undisputedly the concededly crucial evidentiary leads (certain records of money orders) for Schipani's conviction herein were obtained by the Government after and during the most intense portions of the electronic surveillance, was it not error for the District Court to conclude that the Government could re-try Schipani on the entirety of the first-trial proofs except the proofs of "likely source" of income, the District Court's reasoning being that the Government's prosecutive attentions had not become "focused" on Schipani by reason of electronically obtained information but that the Government had originally become interested in Schipani some time before the electronic activity commenced? Can this kind of microscopic surgery of such massive and pervasive electronic cancer be countenanced as a fair and decent procedure in the administration of federal criminal justice? Can it be countenanced either as a general precedent-shaping activity by a Federal District Judge, or as a specific instance on the present record? Should not certiorari be granted here for the reason, without more, that the exceeding peculiarity of the District Court's microsurgery methods in this case call for a review by this Court, for "test case" purposes, in this important area of the law of governmental electronic activity—and *a for-*

tiori, again, for the herein specifically further accompanying reason that all this has taken place in the setting of the very dubious and very disturbing way that the District Court has here construed and applied (and, we submit, tampered with and trampled upon) this Court's 1966 mandate?

5. In any event, conceding *arguendo* that none of our above questions have certiorari merit, should not the case be reviewed by this Court on the electronic issues, to determine (a) whether the District Court's entirely *de novo* formulations as to burden of proof of the Government to negate electronic taint are sound—the District Court here having accepted the test of "beyond a reasonable doubt" on the question of whether specific items of evidence were free of electronic taint, while at the same time it accepted the test of merely "a preponderance of the proofs" on the artificially separated question of whether the Government's "focusing" on Schipani was free of electronic taint; and (b) whether the District Court's evaluation of the evidence at the electronic-suppression hearing was correct? That is, should not the case be reviewed for these purposes, from the "test case" standpoint above suggested, and, again, from the standpoint of the confrontation between what the District Court has here done and what this Court did in its 1966 decision?

6. Was petitioner denied his rights under *Alderman* v. *United States,* 394 U. S. 165, as to the Tony Ricci trespassory bugging in Florida?

7. Is the evidence sufficient for conviction on the net worth theory? This question is not argued in this petition, we respectively preserve it in the event of the grant of certiorari, and we ask leave to re-adopt here our Questions Presented 1, 2 and 3 plus supporting presentation in our petition for certiorari in No. 504, Oct. Term 1966.

8. Was petitioner denied a fair trial in violation of due process of law and of his privilege against self incrimination, as well as his right to counsel and to be free of unreasonable search and seizure, by the reception in evidence, over defense objections, of a statement taken from petitioner while he was under coercive authority in a Federal prison, the statement being the indispensable starting point of the prosecution's entire proof of opening net worth in this case? (Not argued in this petition but preserved in event of granting of certiorari.)

9. Was the petitioner denied a fair trial and a fair and impartial tribunal by the Court's taking over the function of the prosecution in re-fashioning the whole basic prosecutive strategy for the *express purpose* of saving the prosecution from failure of such re-fashioning were not done? (Not argued in this petition but preserved in event of granting of certiorari.)

10. Was the petitioner denied a fair trial by the infection of the record with references to his alleged notorious criminal background? (Not argued in this petition but preserved in event of grant ing of certiorari.)

11. Was the petitioner denied a fair trial and the right of confrontation by the Court's consideration of non-proved "facts" concerning the petitioner's personality, shrewdness, etc.? (Not argued in this petition but preserved in event of granting of certiorari.)

Constitutional Provisions and Statutes Involved

The case involves the Fourth and Ninth Amendments (search and seizure, and privacy), the Fifth Amendment (due process and self incrimination), and the Sixth Amendment (right of counsel and confrontation) of the United States Constitution. It also involves 26 U. S. C. §7201 and 28 U. S. C. §1651.

Statement of the Case

1. Introductory

Petitioner seeks review of a judgment of the United States Court of Appeals for the Second Circuit which affirmed a judgment of the United States District Court for the Eastern District of New York (Weinstein, D.J.), after a trial without a jury, convicting petitioner on five counts of personal income tax evasion through failure to file returns for the years 1956-1960, in violation of 26 U. S. C. §7201, and sentencing him to three years on each count to run concurrently plus committed fines of $2500 on each count totalling $12,500.

This is the second time the case has been tried. The first trial, before Judge Rosling, without a jury, resulted in a conviction and in imposition of the same sentence now imposed; the Court of Appeals affirmed the first-trial conviction in *United States* v. *Schipani*, 362 F. 2d 825 (C. A. 2, 1966); but this Court reversed, on grounds of electronic taint (*Schipani* v. *United States*, 385 U. S. 372, decided December 12, 1966).

The case was tried in both trials on the "net worth" theory. The defendant introduced no proof at either trial; he rested on the insufficiency of the Government's proofs.

The Government's proof of its "net worth" contentions depended to an unusual degree—indeed, we think, to a unique degree in this case as compared with any other reported criminal prosecution in this country on the net worth theory—on a voluminous and complex process of "inferences" claimed to be derivable from "circumstantial evidence". There were no "leads" obtained from the defendant.

But now, in these proceedings for review of the second conviction there is an important difference concerning the appellate merits of those same net-worth-theory issues, because Judge Weinstein found it necessary to suppress a certain portion of the Government's first-trial proofs in view of the circumstances of electronic taint which led to the reversal by this Court in 1966 as above mentioned. Judge Weinstein suppressed all proof of "likely source" of taxable income during the prosecution years (details *infra*). This meant that the Government had to satisfy the test of *United States* v. *Massei*, 355 U. S. 595—"* * * should all possible sources of non-taxable income be negatived, there would be no necessity for proof of a likely source"—and Judge Weinstein concluded the Government met this requirement.

This last makes it of next immediate pertinence to mention that Judge Weinstein decided this second trial *solely* on the *same* proofs the Government introduced in the first trial* (minus the suppressed "likely source" proofs). The Government did introduce into evidence on this second trial just one new item (testimony by FBI Agent Shedd, *infra*), but Judge Weinstein expressly declined to give probative consideration to this single new item. Thus, one new issue is whether the first-trial proof without more, is sufficient for this second conviction, since the first-trial proof is now stripped of any proof of likely source.

The reason why this problem of the sufficiency of the proof in this second trial is so acute, is that (1) the Government's whole indispensable proof of "opening net worth" (as of the beginning of the first indictment year,

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* The entire first-trial record was received in evidence here as an exhibit.

1956) entailed both negating a pre-indictment period cash hoard and negating that such hoard would have been sufficient to account for the expenditures or the alleged "net worth increases" during the indictment years, whereas these proofs to negate cash hoard are intrinsically and notably insufficient in this case; and (2) since "likely source" is out of this case, the Government's burden of negating cash hoard, and of establishing "opening net worth", became increased in this case to the degree of the *Massei* test, *supra* ("*all possible* sources of non-taxable income be negatived").*

2. The Electronic Taint Factor And The Second Trial.

After Schipani lost his previous appeal in the Court of Appeals (362 F. 2d 825—decided June 29, 1966) he petitioned for certiorari, and on November 7, 1966 the petition was denied (385 U. S. 934). Schipani was readying himself to begin serving his jail sentence when, near the end of November 1966, the Solicitor General filed a "Supplemental Memorandum For The United States", a copy of which is reproduced in Appendix F hereto, *infra*. The Solicitor General told this Court it had been discovered that by reason of trespassory electronic activity which "provided investigatory leads and other information used in proceeding against petitioner [Schipani]", "there was material evidence against petitioner which was tainted, his conviction cannot stand, and no purpose would be served here in having the District Court conduct a collateral hearing * * *" (p. 3 of the Solicitor General's supplemental memorandum).

On December 12, 1966 this Court rendered the following opinion *per curiam* (*Schipani* v. *United States*, 385 U. S. 372):

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* As noted in our Questions Presented, we are preserving these issues as to sufficiency of proof in the event of granting of certiorari.

> "Upon the suggestion of the Solicitor General, *and upon an independent examination of the case,* the petition for a rehearing is granted, the order of this Court denying certiorari is vacated, certiorari granted, the judgment of the United States Court of Appeals for the Second Circuit is vacated and the case is remanded to the United States District Court for the Eastern District of New York for a new trial should the Government seek to prosecute petitioner anew." (Emphasis supplied.)

Early in 1968 we were favored with word from the Government that they wanted to re-try Schipani because a "Trial Attorney" in the Department of Justice in Washington was convinced that the Solicitor General had been "in error". We quote from the affidavit of that Washington Trial Attorney (dated May 1968):

> "The United States of America by ELDON F. HAWLEY, Trial Attorney, Criminal Section, Tax Division, Department of Justice represents to the Court as follows that:
>
> (1) Upon information and belief the evidence in the defendant's prior trial, which will be used on a re-trial, is not and was not tainted and should not be suppressed; further analysis and examination by the Government of the evidence establishes that the Solicitor General was in *error,* when he informed the United States Supreme Court that 'Since there was material evidence against petitioner which was tainted, his conviction cannot stand * * *' (Solicitor's General Supplemental Memorandum No. 504, October Term 1966). Although the Solicitor General stated to the Supreme Court that conversations of the defendant were illegal-

> ly and electronically monitored by the FBI at a place of business frequented by the defendant, none of the conversations provided evidence or supplied leads to evidence at defendant's trial." (Emphasis in original.)

Our aforesaid renewed motion to suppress was set for hearing by Judge Weinstein. It was agreed by all concerned that, in view of this Court's ruling, the Government had the burden "of proving that its evidence is not tainted" (Hawley affidavit, *supra*). Early in the renewed suppression hearing it became apparent that the Washington trial attorney who wanted this case re-tried (Mr. Hawley) was quite in earnest in his contention that the case should be re-tried because the Solicitor General was "in error".* For, it appeared that Mr. Hawley wanted to re-try this case not because he had found some new, untainted evidence, independent of the first trial record contents which this Court had *independently examined* and had unqualifiedly pronounced tainted. Instead, it appeared that Mr. Hawley wanted to re-try this case because that adjudicatedly tainted first trial record was not tainted after all. At the outset of the new suppression hearing we pointed out to Judge Weinstein that the Government was confronting the District Judge with the severe jurisdictional dilemma of in effect undertaking a

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* The Solicitor General himself has not been heard from concerning any of this, neither the former Solicitor General (now Mr. Justice Marshall) nor any successor. Even when the time came to "prove" just how such "error" inside the Department of Justice had enmeshed the Solicitor General himself, the Government in the suppression hearing herein did not bother to call even any junior employee of the Solicitor General's office (details *infra*).

collateral "review" of the Supreme Court ruling (Tr. 5/6/68, pp. 12, 43), but the Court said, "I am not concerned with what was before the Solicitor General and I am not concerned with what the Supreme Court did" (*id.*, p. 43). (Subsequently we briefed this same contention twice for the District Court, but without avail.)

In essence, the Government's thrust, in the new suppression hearing, was that each and every item of proof needed to convict Schipani in the first trial could be traced ultimately to a non-tainted source. An elaborate 31-page chart entitled "Analysis Of The Sources Of The Proof" (exhibit 1) had been prepared by I.R.S. agent Masetti, the main investigative agent in the case, to substantiate this contention. The Government also supplied the District Judge and defense counsel with copies of FBI logs of trespassory buggings at a location in New York City (Prisco's Travel Agency) where Schipani frequently visited during the investigative period in 1961; nine of these logs contained conversations by Schipani (exhibit 2); twenty-seven other logs contained conversations of other persons referring to Schipani (exhibits 1A to 1Z). The electronic monitoring covered by these logs extended from January 10, 1961 to January 31, 1963. There had also been electronic monitoring by the Alcohol and Tobacco Tax Unit, but allegedly it produced no evidence (details *infra*).

The Government called Agent Masetti to the stand, several FBI agents, several agents of the Alcohol and Tobacco Tax Unit who had participated in the Schipani investigation, and two Department of Justice lawyers who had worked on the case (details *infra*). The theme of all this testimony was supposed to be that nobody who ever actually got any of the first-trial proof against Schi-

pani had any knowledge of the massive electronic monitoring. According to the Government, every single investigator and Government lawyer who prosecuted Schipani just did not know anything about the whole electronic business. Let us see:

The Government's first witness at the new suppression hearing was I.R.S. Agent Masetti.* Masetti testified concerning Exhibit 1, which he had prepared or had participated in preparing (54 *et seq.*). He stated that he had no contemporaneous knowledge of the electronic activity of the F.B.I. (57-58), and that he had never seen the logs and did not know their contents (112). He had "hearsay" knowledge of the ATTU electronic surveillance (58); he got no information from the ATTU electronic surveillance concerning the Schipani case (112). It is of interest that Masetti also testified that the ATTU electronic surveillance "did not work", according to his understanding (112). This is interesting because, as was made perfectly clear by other witnesses (*infra*), at least one of the two ATTU electronic installations did work quite well, the claim of those other witnesses being that they got no significant information. (We contended in the Courts below that Masetti's overstatement of the situation, in claiming he understood the ATTU installations did not work at all, casts suspicion on the good faith of either Masetti himself or of whichever Government officials supposedly told him this, or on both Masetti and those other officials.)

Masetti then went on to testify extensively as to the sources of the evidence listed in Exhibit 1 (59 *et seq.*). As

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* In the following description of the hearing testimony we shall be referring to transcripts, numbered from pages 1 to 688, dated respectively May 6, 7, 8 and 9, 1968.

was to be expected, there was no electronic surveillance source for any of this evidence, according to Masetti. However, Masetti in several instances admitted he got information from the F.B.I. and saw F.B.I. files (64, 77, 96, 102, 103, 106). (We urged in the Courts below that it is of utmost importance that Masetti thus apparently had access to the F.B.I. files, which of course were saturated with electronically obtained information.)

Further as to Masetti's dealings with ATTU, the Courts below and the Government attached decisive importance to certain alleged physical surveillance by ATTU which supplied the so-called "money orders" leads that are claimed to have "made" this case (details *infra*).* Masetti's testimony as to sources of his evidence in Exhibit 1 is replete with such "money order" references (e.g., 66-75, 77, 84-86, 89-91, 94-102, 104-109, 114-122). We are not overlooking that the ATTU witnesses (*infra*) denied in the hearing that they got any significant information from their own electronic installations. But, as we shall show *infra*, the credibility of this testimony is poor, and the record herein furthermore reveals strong likelihood that the ATTU people got information from the F.B.I. in circumstances indicating taint. *The Government never established that the all-important "money order" leads are free of electronic taint.*

It is to be noted also in connection with Masetti's testimony that he said his initial investigative materials included a memorandum from an I.R.S. Intelligence Agent

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*ATTU physical surveillance spotted Schipani buying money orders at a bank on July 17 and September 25, 1961 (the FBI's trespasssory electronic bugging had started in January 1961). The money order "leads" in turn produced a mass of proof of expenditures, "net worth" increases and "wilfulness".

named Tarangelo (125-130). (Where, we ask, was Mr. Tarangelo during this hearing? Why did not the Government produce Tarangelo? The absence of this witness leaves a gaping hole in the Government's "showing" in this proceeding (*infra*).)

Masetti also testified (136-137) (*re* Tarangelo) that, with a Department of Justice letter turned over to him by Tarangelo at the commencement of his investigation in 1961, he also received "miscellaneous notes" which "included handwritten notes relative to inspection of files of the F.B.I., a note in connection with checking through on the Narcotics Bureau". The Government did not negate in the hearing that those latter papers, which came to Masetti apparently in March 1961 or later, were tainted. True, Masetti also said (138) that the F.B.I. notes he received referred to a report of October 10, 1960* and were made on March 22, 1961 (the notes were introduced in evidence herein as Exhibit 4); but the total picture in regard to Masetti and his F.B.I. materials remains extremely unsatisfying.**

Masetti also testified that subsequently he asked for and received additional F.B.I. information, from F.B.I. Agent McShayne (144, 168-174, 197-198).

Further as to Tarangelo—who did not testify—Masetti said he "probably" had talked to Tarangelo about the latter's activities and information in this case (149-150).

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* Which antedates the within FBI "bug" that started in January 1961 (138). The Government also claims a "clean" 1959 F.B.I. report (*infra*).

** Unsatisfying is hardly the word; see the description *infra* of the November 1966 memorandum by Department of Justice attorney "Dewey" O'Brien.

Masetti also testified that Tarangelo's memorandum had requested certain equipment which, it appears, was sophisticated electronic eavesdropping equipment; and that these requests in Tarangelo's memorandum had been processed by two I.R.S. reviewing officials—who were not produced as witnesses in this proceeding (177-181). Masetti was vague and unsure as to whether these Tarangelo proposals had been carried into effect (180-181).

Masetti was also vague and apparently evasive about his contacts with ATTU (192-196, 207).

ATTU Agent Wallace P. Hay testified for the Government (228 *et seq.*). He was assigned on March 3, 1961 to investigate Schipani's connection with three restaurants, including the Casa Bianca (229-230); this assignment came from Mr. Hundley of the Department of Justice* (*ibid.*). Hay conferred with I.R.S. and F.B.I. officials, but he did not know of any electronic activity by those agencies (230-231). ATTU's own electronic installations revealed nothing of significance (232, 234). These installations, at the Pierrepont Health Club in Brooklyn, were run from August 21 to September 8, 1961 (237). We especially invite attention to pp. 276-284 of Hay's testimony where he testified with obvious evasiveness about his contacts with F.B.I. and I.R.S. intelligence personnel, and about his knowledge of the workings of the Justice Department's "organized crime" activities. Hay also testified about a meeting in Mr. Rogovin's office in the Department of Justice in Washington in November 1966 when the electronic problems of this case were being reviewed; Hay told Mr. Rogovin and Mr. O'Brien** that the

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* Organized Crime Section.

** Mr. Rogovin was Assistant Attorney General, Tax Division; Mr. O'Brien was one of his aides. They were reviewing the case at request of then Solicitor General Marshall (*infra*).

ATTU electronic installations had produced nothing significant, and that he had had no knowledge of the F.B.I. electronic activities (289-297).

(On the basis of this last-mentioned testimony of Hay we note that the Solicitor General's office in November 1966 was fully aware of ATTU's claim that their electronic installations had yielded nothing significant and of their claim also that they had not gotten anything from the F.B.I. installations. This is important, we submit, as indicating that the Solicitor General did not proceed on any "error" supposedly consisting of any erroneous impression as to taint on the part of ATTU.)

We refer especially also to Hay's testimony at 302-306, 313-314 and 335-336 where he admitted that in September 1961 he had requested additional and better electronic equipment, but claimed that although he received it he never used it in connection with Schipani.

Important also is Hay's testimony at 314-330, 336-337, where he described the activities of his assistant Busby. Busby had a radio for contact with other agents while he was monitoring the ATTU installation at the Health Club. Those other agents were engaged in surveillance of Schipani, and it is manifest that Busby's monitoring at the Health Club assisted him in coordinating with the surveillance agents for the furtherance of the latter agents' activities. (Here, we submit, is direct and incontrovertible proof from the Government's own admissions that the Health Club "bug" did play a tangible part in the Schipani investigation which led to this prosecution.*

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* This Health Club bug and the attendant physical surveillance were vital in the obtaining of the crucial "money order" leads.

ATTU Agent George T. Busby testified for the Government (343 *et seq.*). He said that the ATTU bugs produced nothing significant, and that a KEL installation did not work (345). He claimed he had no contemporaneous knowledge of the F.B.I. electronic activity (349). Busby admitted that he conferred with F.B.I. Agent McShayne in 1961 for "general liason" and to obtain information about Schipani, and that he did get "leads" and "clues" from McShayne; also that he "undoubtedly" had similar contacts with other F.B.I. officials or agents (370-374).

We argued below that this last described testimony of the ATTU witness Busby is in itself enough, without more, to defeat the Government's showing of non-taint. Busby apparently qualified his testimony under questioning by the Court at 373-374, but see the re-cross examination at 374-375.

ATTU Agent Pierre Rogers (376 *et seq.*) denied having any electronically obtained information concerning Schipani (377) or any contemporaneous knowledge of the F.B.I. electronic activity (377-378). In connection with Rogers' testimony it should be especially noted that this was one of the agents whose alleged physical surveillance activities opened up for the Government the "money orders" lead, which occurred on July 17 and September 25, 1961. It is conceded by the Government that its "saturational" * focus on Schipani began some months before the earlier and the latter dates, and *that during all of that time and earlier the F.B.I. bug had been in use.* We

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Judge Weinstein treated the "saturation" issue (or "focussing" of the 1961 Schipani investigation) as of prime importance in determining the influence of the FBI bugging on the building of this case (*infra*).

also noted earlier that ATTU's own physical surveillance was aided by the Health Club bug. Is there then not the strongest circumstantial indication that the intense focusing which resulted in the all-important money order leads of July 17 and September 25, 1961 is integrally bound up with the antecedent electronic activity?

Former ATTU Agent Thomas H. Maher (382 *et seq.*) denied obtaining any significant electronic information from the ATTU bugs, and any contemporaneous knowledge of the F.B.I. electronic activity (383). However, he knew of ATTU's liason with the F.B.I., and he had one meeting himself with F.B.I. Agent McShayne, at Maher's own request, Maher stating that he was seeking leads as to ownership of restaurants, labor union activities, garbage disposal business, and "any leads" relating to Schipani's "activities"; and when asked whether he received any such information from the F.B.I., he said "We must have received something" (384-387).

On the basis of this last described testimony of Maher we urged in the Courts below, as in regard to the similar admissions of ATTU Agent Busby, that these disclosures, without more, are sufficient to defeat the Government's showing of non-taint in this proceeding.

ATTU Agent Donald Zimmerman denied getting any significant information from ATTU's bugs or contemporaneous knowledge of the F.B.I.'s electronic activities (389).*

F.B.I. Agent James T. McShayne described the F.B.I. electronic installations and the operations thereunder (401-405). He never informed ATTU or I.R.S. about these

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* We are aiming in this Statement of the Case to give a summary of the *entire* suppression-hearing testimony.

activities (405), and he made no "dissemination" of electronically obtained information to any other Federal agency (405-406). McShayne said the F.B.I. had considerable information concerning Schipani prior to January 1961, when their bugging commenced (404-405). He was shown Government's Exhibit 9, an F.B.I. report or memorandum of October 10, 1960, which contained references to Gurney's Inn and to Schipani's son's wedding; this exhibit, McShayne said, contained nothing derived from any electronic source (407-409). He insisted that in his conferences with I.R.S. and ATTU representatives he gave them only innocuous "background" information (409-410). It was never made clear by McShayne just how he handled the allegedly taint-free Exhibit 9 items as distinct from subsequent F.B.I. information which was derived from electronic sources, in his dealings with the other agencies.

McShayne testified that he was not assigned to the Schipani matter until some two or three months after the F.B.I. electronic activities began in 1961 (416-419). We called the attention of the Courts below to this last item as another indication of the way in which an intensifying dynamic was apparently operating in this case in chronological and causative relation to the F.B.I. electronic activities. A similar item is McShayne's testimony that one reason he was assigned to the Schipani case was that "I had current knowledge of Mr. Schipani's activities as a result of this electronic surveillance" (420-424). The dynamic was revealed also in McShayne's testimony that when he first started the Clemente*-directed bugging at Prisco's Travel Agency he had never heard of Schipani;

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* The original F.B.I. monitoring target at Prisco's Travel Agency was Michelino Clemente.

he first heard of Schipani from the results of that bugging (441-442). And he said that the bugging revealed information about the Casa Bianca restaurant, labor union activities, and the garbage business (443-444.)*

While McShayne was insistent, as above noted, that he gave only innocuous "back-ground" information to other agencies, he admitted on cross-examination that he had "cooperated" with other law enforcement agencies in the Schipani investigation (434-435); *and he had no knowledge as to whether his superior officers in Washington had given information to other agencies* (449-454, 456). He also admitted that he had conferred with ATTU Agent Hay, and that another F.B.I. agent had done so, in the Summer of 1961, concerning Schipani (454-456).

Of foremost interest was McShayne's testimony at 458-459 that neither he nor anyone else of whom he knows in the F.B.I. were consulted by Mr. Rogovin or the Solicitor General at the time of the Schipani review discussions in November 1966. (Since it is inconceivable that no one from the office of Mr. Rogovin or of the Solicitor General had any communication at all with responsible F.B.I. representatives at that juncture in 1966, the record presents another gaping hole from the standpoint of completeness of the Government's showing. Where is the F.B.I. functionary, or functionaries, who *must have been* consulted by Mr. Rogovin or the Solicitor General or their representatives? The Government has not negated that there was such consultation.)

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* These were activities offered by the Government as "likely source" items in this prosecution.

Philip Wilens, a Department of Justice attorney,* testified for the Government concerning the letters and memoranda in the Department of Justice in early 1961 which apparently initiated or helped to initiate the Schipani investigation (473 *et seq.*). He said he had no contemporaneous knowledge of the F.B.I. electronic activity (483-484); but he also said that he had been transferred to another assignment early in the year 1961 (479, 487). He testified also that his initial written recommendations early in 1961 had been based on the F.B.I. report or memorandum of October 10, 1960, Exhibit 9** (476-479). Mr. Wilens also testified that he received voluminous and regular F.B.I. reports on the Schipani matter (485-486); and he did not know whether he had seen the Exhibit 11 series of F.B.I. reports, which concededly were based on the electronic activity; he thought his successor, a Mr. Gerald Shur would know about this (499-508). (*It is therefore interesting that the Government did not see fit to produce Mr. Shur as a witness in this proceeding.*)‡

Mr. Wilens also said that upon receiving the kind of information contained in the F.B.I. reports here in question it would have been the regular practice in his office to alert other law-enforcement agencies, but with use of evasive tactics to conceal that the information was from electronic sources (499-508). (The Exhibit 11 series of F.B.I. reports—the reports referred to by Mr. Wilens—are replete with passages plainly suggesting on their face that live human conversations had been audited.)

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* Organized Crime Section.

** Which allegedly is untainted.

‡ Shur's name and activities become practically ubiquitous as will soon appear—ubiquitous, that is, everywhere except in this hearing record of governmental witnesses produced for questioning.

Also interesting in Mr. Wilens' testimony was that he knew nothing of the review proceeding in November 1966 by Mr. Rogovin and the Solicitor General (509-510). The question therefore arises, did Mr. Wilens' successor Mr. Shur participate in the latter discussions, and if so why has the Government not produced him; and if not, why has the Government not negated such role of Mr. Shur?

F.B.I. Agent James T. Mulroy testified for the Government that he had made no dissemination of the Schipani electronic information "to any agency of the United States Treasury Department" (515-516).

(We may here note that *nowhere in the Government's proof in this hearing was there any distinct, or even indistinct, showing as to the F.B.I.'s disclosures of its electronic data to attorneys of the Department of Justice*—who would be the gentlemen ultimately responsible for the actual institution of this criminal prosecution. It is self evident that there must have been such "dissemination" to the Justice Department's prosecuting attorneys.* See the multifarious instances in this record where witnesses speaking for various Government agencies have claimed that they did not know what representatives of other agencies were doing—from which the Government's attorneys who presented this matter in the Courts below in effect asked those Courts to conclude that the Government's case is free of unconstitutional electronic taint on this basis of the existence in the Government's far-flung law-enforcement establishment of any number of "Poohbahs" who function unto themselves alone. We urged in the Courts below that the constitutional policy of "deterrence" of unconstitutional police conduct (*e.g.*,

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* One answer to this mystery is probably attorney Shur (details *infra*).

Linkletter v. *Walker*, 381 U. S. 618, 629) is hopeless when even the most "saturational" illegal electronic eavesdropping by Federal police may be held to be of no constitutional significance on the mere claim of the various police witnesses that each of them (or the enforcement agency which employed each of them) functioned "autonomously" and without mutual knowledge of what the others were doing.)

We interrupted our description of the testimony of F.B.I. Agent Mulroy, *supra*, to insert the above theme of comment. Agent Mulroy further testified that, in regard to the Exhibit 11 series of F.B.I. electronically obtained reports, certain of the contents thereof "could be disclosed" to other agencies but not the text thereof; and that if I.R.S. Agent Masetti had asked for F.B.I. information about "any restaurants" in which Schipani had an interest, "and you looked at the report that had anything to that effect, would you tell him about it?", agent Mulroy answered flatly "yes" (544-545).

F.B.I. agent Norman A. Murray testified for the Government that there had been no "dissemination" by him of the F.B.I.'s electronic information (565), and that he knew of cooperation with other agencies (571).

F.B.I. agent Guy C. Berado testified that he had not "disseminated" any of the F.B.I. electronic information (575).

F.B.I. agent Ralph Desena testified that he had no contacts with Treasury Department personnel (577). When it came to giving F.B.I. electronic information to other agencies, he would find means of camouflaging the source *but would, apparently, give the substance of the information* (580-581). (Here again we have one of those occasional narrow but very revealing beams of light af-

forded by this hearing record, to the effect that the *F.B.I. electronic information must in fact have got through to the herein ultimately significant person, agent Masetti of the I.R.S.*)

F.B.I. supervisory official James Patrick Mansfield was examined on direct examination by defense counsel in this hearing (586 *et seq.*). Mansfield was agent McShayne's supervisor, having taken over from a Mr. Emery (588, 591); *Emery did not testify in this hearing.* Mansfield said he had no contemporaneous knowledge of the F.B.I. electronic activity concerning Schipani (589). He did know of the F.B.I. electronic surveillance directed at Clemente (589-590, 594). At 596-612 Mansfield sparred with defense counsel repeatedly as to what he had learned from his subordinates about Schipani. At 612-613 Mansfield similarly hedged as to what information would be given by the F.B.I. to other agencies. He admitted, however, that Attorney General Kennedy's directives at the time in question *ordered cooperation with other agencies to the completest extent possible* (613-614).*

F.B.I. agent McShayne was recalled to the stand by the Government (617 *et seq.*). McShayne had marked with red and blue pencils the portions of the Exhibit 11 series of the F.B.I. reports to indicate which items came from the electronic surveillance (618-269). We invite this Court to scan the impressive aggregation of these tainted items thus marked by McShayne in the F.B.I. reports covering the two years' electronic surveillance period (1961-1963).

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* Agent Mansfield, evidently not an official overly burdened with a sense of intra-agency reverence towards the superior "civilian" echelons in the Department of Justice, unhesitatingly gave it as his opinion that Solicitor General Marshall had "erred" in this case (614).

The last witness at the suppression hearing was Department of Justice Attorney James D. "Dewey" O'Brien (642 *et seq.*). Unlike all of the Government's other witnesses in this matter (*supra*), Mr. O'Brien was truly a "key" witness on the issue of taint,* because Mr. O'Brien is the official who made the initial study of the Schipani case late in 1966 which culminated in the Solicitor General's Supplemental Memorandum to this Court recommending a vacating of the conviction for electronic taint. The results of Mr. O'Brien's study were written up by him in a six-page typewritten memorandum dated November 18, 1966 (Govt's exhibit 15 in the suppression hearing herein, printed as Appendix G hereto, *infra*).

It appears that Mr. O'Brien's memorandum came about as part of the Departmental program during the latter part of 1966 for a thorough self-searching governmental review of electronically tainted federal criminal prosecutions, a program prompted by the happenings of the *Black* case (*Black* v. *United States*, 385 U. S. 26, decided

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* Not even Agent Masetti was a key witness in any degree comparable to Mr. O'Brien. For the ultimate question is not whether Masetti, or any other I.R.S. or even Department of Justice prosecutive officials actually consciously knew electronic taint existed; the ultimate question is whether Masetti or anyone else who helped to "make" this case had in some way received or acted on information tainted by what the FBI had done. This simple and realistic question was unfortunately obscured by Judge Weinstein's peculiarly formalistic method of analyzing the issues and proofs in the suppression hearing, i.e., he formulated a supposed differentiation between (a) whether specific items of trial proof were tainted and (b) whether "focusing" or intensification of the prosecutive effort as a whole in the Schipani matter had been influenced by the electronic activity. See further *infra* as to this "logical" approach of the Court below.

November 7, 1966), where the Court threw out a criminal conviction for electronic taint even though the Government represented that its attorneys responsible for the prosecution got nothing of value from or had no contemporaneous knowledge of the electronic activity.

(The now famous "Schipani review procedure" in which the Solicitor General proposed and this Court adopted a systematic program, post-*Black*, for reviewing cases thus tainted, is a creation that came out of the deliberate and careful efforts pressed by then Solicitor General Marshall inside the Department of Justice in conjunction with the *Black* case problem. And it is this creation, the "Schipani review procedure", which is, we surmise, the Government's real target in this present second trial of Joseph Schipani. Far more is at stake here, then, than the re-conviction of Joseph Schipani as an individual. What we are having here is a flank attack on the whole Fourth Amendment rampart against electronic abuses. Utmost care is therefore needed in the judicial evaluation of the record of the suppression hearing in this case, and utmost scrutiny is needed in reviewing just exactly what Judge Weinstein has done in this case. It is our position that nothing in this suppression hearing record justifies what Judge Weinstein has done in allowing this case to be re-tried solely and exclusively on the first-trial record which this Court adjudged to be tainted, and that the one item in this suppression hearing record which above all imported into that record something of real significance for the issue, the O'Brien memorandum (*infra*), was utterly misapprehended by the Courts below. It is also our position that items far more important than even the O'Brien memorandum—the testimony of the several other key Government officials in this matter who were not brought to testify before Judge Weinstein—

will need to be known before the deliberate policy choice of Solicitor General Marshall and the deliberate independent adjudication of this Court, in November-December 1966, can ever validly be judged to have been "in error".)

Let us return to the subject of the O'Brien memorandum. The memorandum states that Mr. O'Brien had read five volumes of relevant FBI electronic logs, the Criminal Division's office files, the ATU case reports, and the trial Court's (Judge Rosling) findings of facts on Schipani. Mr. O'Brien then noted how, in the nature of net worth prosecutions, "everything which relates to the financial condition or enterprises of the defendant during the period under examination is material". Mr. O'Brien then referred to Judge Rosling's findings and noted that the Judge had discussed various alleged business interests of Schipani including particularly the Casa Bianca restaurant and labor union services. Mr. O'Brien then noted that Masetti on February 20, 1963 reported having commenced the Schipani income tax case as a result of a memorandum in the Spring of 1961, in conjunction with which Mr. O'Brien noted "the context" of an electronic surveillance of Schipani from January 10, 1961 to January 31, 1963. The Masetti report of February 20, 1963 referred to various alleged illicit business activities of Schipani, including activities as to which the F.B.I. electronic logs abound with detailed references.

Mr. O'Brien also stated that the Masetti report of February 20, 1963 was by Masetti and another I.R.S. special agent, Wynne. (We therefore ask, where was Agent Wynne in this suppression hearing—another of the big gaps in the Government's ostensible plenary "showing" to negate taint.) Farther on in his memorandum Mr. OBrien gives numerous details of how the contents of the F.B.I.

logs correspond to the contents of the Masetti-Wynne report of February 20, 1963.

Then, examining the chronology of the Schipani matter at the level of the Department of Justice Attorneys of the Organized Crime Section and the Criminal Division, Mr. O'Brien lists happenings which reveal the time conjunctions between the F.B.I. monitoring and the inception and intensification of the efforts of the Government Attorneys, early in 1961. Mr. O'Brien then describes in detail the further numerous coincidings of the leads produced by the logs and of the spreading and intensifying investigations by both Department of Justice and Internal Revenue personnel through the middle months of 1961 especially, when the F.B.I. monitoring was at its height and was producing a spate of information about Schipani.

(It is hopelessly beyond the space confines of this petition for us to attempt even the most superficial summary of the relevant contents of the thirty-six F.B.I. logs. Aside from specific items in those logs which tie in so acutely with the evolution of this prosecution in 1961-1963, there is the perhaps more significant factor that the logs seethe with just the sort of raw, undigested "data" of notorious "organized crime" personages and activities that would naturally appeal to the prosecutive mentality as offering especially tempting avenues for sensationalistic prosecution of a Joseph Schipani. If ever electronic "data" spurred zealous prosecutors to pursue a particular individual, it happened here. To anyone reading the full text of these logs, it is simply preposterous to think that this "data" had nothing to do with this income tax prosecution; or that this "data" did not filter through from the F.B.I. to the I.R.S. investigators and the prosecuting lawyers; or that somehow a "clean" case against Schipani can be quarantined out of the infected totality. Thanks

to the apparently extraordinary degree of inter-agency co-operation and unity of effort that Schipani inspired in 1961-1963, this is probably the last case in which any properly advised Court would conclude that such quarantine is possible here.)

Of special interest also in Mr. O'Brien's memorandum is his detailed reference to a report of Masetti dated May 14, 1962 relating his liaison with his predecessor I.R.S. Agent Tarangelo—this Tarangelo is the I.R.S. agent of whom we previously spoke as having avidly preoccupied himself with means for improving additional electronic surveillance by *I.R.S. itself* in the Spring of 1961, and it is this Tarangelo who is one of those important witnesses that was never heard from in this suppression hearing. Mr. O'Brien, speaking of this Masetti-Tarangelo phase, notes that Masetti apparently took over from Tarengelo shortly before May 1, 1961 and that at that time Masetti reported "that he had reviewed Tarengelo's materials, including transcripts of files of * * * F.B.I." which revealed some of Schipani's "financial interests". It will be recalled that by that time (May 1961) the F.B.I. had been bugging the Schipani locale (Prisco's Travel Agency) for nearly four months.

Inconspicuously (but inconspicuous only to the unknowing eye) nestled in Mr. O'Brien's intriguing memorandum is the following item, which is probably the single most important specific factual revelation in that memorandum:

> "* * * In a memo from Shur [a Department of Justice Criminal Division attorney] to Silbering [Chief of the Organized Crime Section] dated May 29, 1961, Shur said the last FBI report was 10-10-60 but this obviously referred only to a report on *Schipani* as he also referred to an FBI report dated May 3, 1961, on *Clemente* the subject of the electronic sur-

> veilance. Special agent Donovan (apparently of the FBI), according to Shur, stated Shur would receive periodic intelligence reports and recommended that the I.R.S. continue with the investigation of the cartage association as it did not involve crossing State lines. Shur also referred to what Donovan told him concerning Schipani in the garbage collecting business and that Schipani was a Profaci man. He quoted the 5-3-61 report of the FBI on Clemente."

Concerning the item just quoted we ask: (1) Again, where was Attorney Shur in this suppression hearing; why was he not called by the Government (in pursuance of its supposed discharge of its burden of proof to negate taint)? (2) Where was, also, Donovan in this supprression hearing—here we have an entirely new gap in the Government's "showing". (3) Can there be any doubt, in view of the above words of the knowledgable Mr. O'Brien—a Department of Justice career attorney who was Assistant Chief of the Criminal Section of the Tax Division in Washington at the time he wrote the instant memorandum, and who later took over comparable rank and duty in the Civil Section of that Division—that there was ample cause indeed, in November 1966, in the Solicitor General's office, to conclude that the F.B.I. electronic activity had been "getting through" to the Department's prosecutive lawyers? And is it not disturbing that, in view of this single most revealing item in the O'Brien memorandum, and in view of the endemic agnosticism or innocent ignorance professed by the chosen list of witnesses whom the Government did produce before Judge Weinstein, for some unexplained reason Judge Weinstein and we were not favored with testimony from the evidently strategic

Messrs. Shur and Donovan? Is it possible to doubt that, in this Shur-Donovan sector, lies (thus far hidden) one path to revelation of the actual truth about the issue of electronic taint in this case? And only the Muse of overzealous Governmental Prosecutors can know all there really is to be known about other like hidden sectors and hidden pathways in this case.*

Mr. O'Brien's memorandum further notes that in a report around the end of May 1961 Masetti made it perfectly clear just how closely he was working with the F.B.I.—"said he would arrange to secure information from the files of the F.B.I." Mr. O'Brien also notes that on July 12, 1961 the busy Mr. Shur wrote of "a field trip on the case in which he talked to agents of the different agencies." Mr. O'Brien gives two additional proofs of the excellent mutual absorption of investigative information among the several agencies that had come about by mid-July 1961:

> "By letter of July 17, 1961, Mr. Miller [Assistant Attorney General in charge of the Criminal Division] asked Mr. Caplin [Head of I.R.S.] for a 'saturation investigation' because of information 'supplied us by other investigative agencies'. An-

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* We speak of the "Muse" of the Prosecutors, rather than of the individual prosecutive gentlemen themselves, because in the bureaucratic maze it may well happen that a conscientious Government lawyer like prosecutor Hawley in this case has himself not been able to find out all the relevant facts about the taint issue. Nevertheless, any such forgiveable failure on Mr. Hawley's part individually, does not foreclose us from adducing the demonstrable record indications that there is more to be known and that somewhere within the four corners of the Government's total knowledge the full truth does exist and is available for judicial disclosure, and has not thus far been disclosed.

> other letter (10-19-61) to Alan Long [Director of the I.R.S. Intelligence Division] gave full report on Schipani and said 'the following information was obtained from recent reports of the FBI' * * *".

Immediately following this last item in his memorandum Mr. O'Brien states, "The FBI reports often parrot almost verbatim what was overheard by means of the electronic surveillance of Clementi and Schipani".

In concluding his memorandum Mr. O'Brien said:

> "From the foregoing, it can be seen that during the period in which the Schipani tax case was investigated the Government achieved the rare objective of complete interchange of information between three investigative agencies and the Department of Justice. Unfortunately, much of it was tainted.
>
> *"I do not see how we can support the conviction thus obtained of Schipani on income tax evasion charges.* The nature of the proof is such that I would have little hope of ever perfecting a taint-free case. * * * [I]n view of the fact that three Government agencies were, apparently keeping a personal surveillance of the defendant, it would be difficult to convince a Court that anything is free from taint."* (Italics in original.)

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* In the omitted portion of the above quoted item from Mr. O'Brien's memorandum he referred to possibilities of tracing prosecutive proofs to non-tainted sources, but all of these non-taint possibilities mentioned by Mr. O'Brien related solely to "likely source" of income, not to the structure of the inter-

(Footnote continued on following page)

As above mentioned, the Government called Mr. O'Brien to testify in this suppression hearing (642 *et seq.*). The prosecutor tried by various lines of questioning to get Mr. O'Brien to repudiate his memorandum or at least to palliate it—in short, to help the prosecutor's theory that the Solicitor General and this Court were "in error". But apparently in Mr. O'Brien the prosecutor had the wrong man for any such purpose. The closest that the prosecutor was able to come in getting any solace out of Mr. O'Brien was in eliciting from him that (1) he did not think he had seen the entirety of the evidence and exhibits of the first trial (648), (2) that he had not written the Solictor General's Supplemental Memorandum (657-658), and (3) that as to the statement in said Supplemental Memorandum that "Some of the material in the F.B.I. reports * * * provided investigatory leads and other information used in proceeding against petitioner" he (Mr. O'Brien) would not have phrased it that way if he had written it but would have said "may have provided" (660-661).

The heart of Mr. O'Brien's testimony is in the transcript at pages 657-659 where, under questioning by the

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(*Footnote continued from preceding page*)

joined several elements of the requisite net worth proofs as a whole. Judge Weinstein has suppressed all proof of likely source in this case anyhow, as earlier noted. The big question is, and it is the question for which Mr. O'Brien's memorandum offers no hope of an answer favorable to the Government, can this net-worth theory prosecution as a whole be maintained on a taint-free basis in view of all of the foregoing circumstances of taint depicted in Mr. O'Brien's memorandum, thereafter solemnly recommended for reversal of the conviction in Solicitor General Marshall's Supplemental Memorandum to this Court, and then acted upon by this Court *via* its own expressly announced "independent examination of the case".

Court, he confirmed that, in contrast with the *Black* case, "I did recommend, of course, that we concede the necessity of a new trial" and "because the investigation was contemporaneous with the intercepts and there had been exchanges of information between the investigative agencies * * * [e]ssentially our position was, and I think the key part of this is that: 'We cannot say in the instant case that none of the evidence used was obtained directly or indirectly from an improper source'" (657-658).

Nowhere in Mr. O'Brien's testimony is there the remotest intimation that he would now change his mind, as the prosecutor himself was apparently satisfied should be done. The prosecutor did not get Mr. O'Brien to say that he (or the Solicitor General) were now shown to have been "in error". The prosecutor, before calling Mr. O'Brien to the stand, might have had Mr. O'Brien examine thoroughly Agent Masetti's exhibit 1 in order that Mr. O'Brien might decide whether in truth his original opinion had been wrong; but it is evident that the prosecutor had not had Mr. O'Brien look into exhibit 1. Is this because the prosecutor feared Mr. O'Brien would not endorse Masetti's exhibit 1 or the prosecutor's new-fangled theory of "error". It is extremely significant that Mr. O'Brien was not put through a study of exhibit 1, and was apparently not even asked by the prosecutor to read the testimony of the agents and other Government officers who had preceded him on the stand in this suppression hearing. He was not asked to study or to read any of that material in preparation for taking the stand himself, and we say that this is extremely significant. For, without Mr. O'Brien's having gone into that material before taking the stand, all that the Government was asking him (from any meaningful probative standpoint) was whether his November 1966 memorandum was justified at the time it

was written, and Mr. O'Brien said it was, as we have just seen. The Government could not, and we suggest it dared not, ask Mr. O'Brien whether he agreed with the prosecutor's supposedly detailed "new" reasons for now urging that there was "error" in 1966.

The record is clear (*supra*) from Masetti's own testimony that he was present at the largely attended conference in Mr. Rogovin's office at the end of November 1966, where Mr. O'Brien was also present. And the record shows also that Mr. O'Brien had interviewed both Masetti and the ATTU agents at a stage which evidently preceded both the meeting in Mr. Rogovin's office and, obviously, the Solicitor General's Supplemental Memorandum in the Supreme Court (648). Thus Masetti, and the ATTU people, were evidently interrogated in the intensest fashion before Mr. Rogovin made his recommen lation to the Solicitor General—and before the Solicitor General announced his position to this Court.

Had the Government called as witnesses in the suppression hearing, in a proper and meaningful descending "echelon" series, the former Solictor General himself and thence all other persons having knowledge of the alleged "error", the picture might claim some pretense towards probative rationality at least. But instead the Government only made haphazard stabs at the problem, with the result that the picture ends up probatively meaningless. In a word, the Government has not revealingly portrayed at all just how it came about that the Solicitor General "erred" in November-December 1966. *A fortiori*, the Government has not even touched at all the staggering problem of demonstrating how the Supreme Court of the United States "erred".

The above concludes our description of the proofs at the suppression hearing. Judge Weinstein wrote a lengthy opinion, which is set forth in Appendix C hereto, *infra*. His conclusion was that "All evidence relating to the defendant's likely sources of income which was introduced at the first trial is suppressed. The motion is denied in all other respects". The net result of this ruling, taken together with Judge Weinstein's subsequent Memorandum And Order of October 14, 1968 (printed as Appendix D hereto, *infra*) which struck or suppressed all evidence as to illicit income, and which ruled that the Court would not rely on the only new evidence of "likely source" adduced by the Government for the second trial (testimony of F.B.I. Agent Shedd), was that the case went to the trier of the facts in the second trial herein solely and exclusively on the evidence in the first trial record (minus all "likely source" evidence). But what Judge Weinstein's ruling on the motion to suppress (Appendix C hereto, *infra*) also meant was that the Government was allowed to keep and to use again at the second trial the entire first-trial proof of income tax violation *via* the net worth theory, omitting only the likely source items. That is, despite the permeation of the whole investigation by the influence of the F.B.I. and ATTU electronic activities which this Court had independently adjudicated as tainting the case, Judge Weinstein permitted the Government to salvage the case as a whole and, particularly, the "money order" leads from which admittedly the Government had built the entirety of its net worth proofs as to the indispensable items of expenditures and net worth increases in the indictment years. Judge Weinstein's reasoning enabled him to arrive at this twofold conclusion—suppress likely source and save everything else as untained—by posing a distinction between (1) the influence

of the electronic activity on the obtaining of specific evidence, and (2) the influence of that activity on the Government's overall decision in 1961 to "focus" on an income tax prosecution of Schipani. This distinction artificialized the whole actual reality of what had taken place in 1961, it conferred on the unitary taint of the inter-agency conduct in 1961-1963 the benefit of an arbitrary judicial surgery to amputate from the unitary corpus tainted substances which had already hopelessly infected the whole: and it did not even consistently apply the idea of distinguishing between "focus" and specific items of proof, because, without justification (*infra*), it suppressed the likely source items while salvaging the *at least* equally tainted "money order" item.*

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* The Government has insisted above all that its likely source items are surely pure because they derive ultimately from pretaint FBI reports of 1959 and 1960. Yet Judge Weinstein suppressed the likely source items. The Government has not even tried to suggest that the "money order" leads pre-dated the tainting electronic activity. Yet, these latter items Judge Weinstein declined to suppress. Is this because, under the law of networthy theory prosecution, the Government can convict a man without showing "likely source", but could never get a conviction in a case like this one without the money order leads that made possible the proof of expenditures and net worth increases? Did the Courts below make a judicial judgment, or did they make a "stragetic" one in disposing of our motion to suppress?

3. The Second-Trial Proofs As Such (Consisting Of A Re-Incorporation Of The First-Trial Proofs Into The Second-Trial Record Except For Proof Of Likely Source)

At the second trial as such*—*i.e.*, the proceedings before Judge Weinstein following conclusion of the proceeding on the motion to suppress (*supra*)—the proof consisted solely of a stipulation (reserving various rights as to admissibility of evidence) plus the entirety of the first-trial record subject to the terms of the latter stipulation. The defense rested without introducing any evidence (Tr. 9-16-68, p. 73). Judge Weinstein found Schipani guilty on all counts (Appendix E hereto, *infra*).

* * *

The opinion of the Court of Appeals affirming the conviction (Appendix A hereto, *infra*) in essence approved all of Judge Weinstein's reasons and conclusions.

Reasons For Granting The Writ

1. The electronic-taint issues in this case are broader than those of a mere issue of "suppression" of specific items of illegally obtained evidence. The broader issue is whether the Government may constitutionally re-try this case at all, in view of the entire background situation, *i.e.*, the circumstances of this Court's order in December 1966 vacating the judgment of the Court of Appeals and

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* The stenographer's transcript of what we have above termed the second-trial proceedings as such consists of minutes for September 16, 1968 numbered pages 23-97, and minutes for November 1, 1968 numbered pages 1-59a. The sentencing minutes (December 6, 1968) were not ordered to be typed.

remanding the case, and the circumstances of the Solicitor General's Supplemental Memorandum which resulted in the latter order of this Court. The Government has taken the position, now endorsed by both Courts below, that, in effect, nothing which occurred in this Court's action of December 1966 has any binding force here because the Solicitor General was "in error." But the Government (and the Courts below) ignore the significance of the words "and upon an independent examination of the case" in this Court's *per curiam* order of December 12, 1966. Unless this last-quoted language in this Court's order is correctly understood and applied, there emerges an indeed most peculiar cluster of procedural difficulties of the most fundamental sort, difficulties touching profound issues of federal jurisdiction as well as individual constitutional right, difficulties which we respectfully think were not adequately considered by the Courts below. For, when this Court expressly states in a formal order or decision that such order or decision is made "upon an independent examination of the case," does it not of necessity follow that, in any subsequent proceeding *upon remand to a lower Court,* such lower Court is required to construe the mandate of this Court in the light of the decisionally announced statement of this Court that its order of remand is based upon such "independent examination?". That is, do we not have here a difficulty far transcending even the difficulty posed by a lower-echelon governmental claim of an alleged "error" by the Solicitor General—the Federal officer designated by Congress to represent the Government in the Supreme Court of the United States (28 U.S.C. §518)? Do we not have here, to speak bluntly, what amounts to an invitation ("imposition upon" might be the truer phrase) by Government attorneys to a lower Federal Court to en-

gage in a form of collateral review of a decision of the Supreme Court of the United States?

Why, since the Government of necessity is accusing this Court and not only the Solicitor General of "error", did not the Government go directly before this Court for consideration of the Government's instant *de novo* contentions? What right has the Government, instead, to demand that a lower Federal Court should collaterally review the Supreme Court of the United States, under the form of "construing" or "applying" the mandate of the Supreme Court. There was open to the Government at all times herein since December, 1966, the conventional rehearing procedure in this Court—notwithstanding the lapse of time involved since the December, 1966 order of this Court. *Cf. United States* v. *Ohio Power Co.*, 353 U. S. 98, 99, granting out of time a re-hearing on the principle that "the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules." That is, if the Government is convinced that the Solicitor General "erred" in the November-December, 1966 situation, such still does not excuse the Government from the duty of any litigant to refrain from collateral attack upon a *judgment* until after first exhausting all avenues of direct review, and such an avenue (the re-hearing procedure in this Court) has been and is open to the Government here. The Government's duty to resort first to this Supreme Court rehearing procedure is plain, for the reason, again, that the Court's order of December 12, 1966, is based "upon an independent examination of the case", and not only "upon the suggestion of the Solicitor General" which the Government now claims was "error".

The impact of the incongruous procedural situation which the Government has here created strikes still more

acutely when one reflects that the instant suppression-hearing record is totally devoid of any proof as to what went into this Court's "independent examination of the case". To be sure, this last suggestion of ours embodies a truism, for it goes without saying there may scarcely ever be expected to arise an occasion when a party may hope to be able to "prove" any such *in camera* contents of the decisional deliberations of this Court. But by this same token it follows that the Government was asking a lower Federal Court *to do the impossible,* namely, to make a collateral *judicial determination* that when the Supreme Court of the United States announced, *without stating reasons,* a decision "upon an independent examination of the case" that Court "erred".

It is unthinkable that when this Court used the words "upon an independent examination of the case", it meant to empower the Court below to find, upon its *de novo* re-examination of the record or of any new showing by the Government, that this case never really had to be vacated and remanded by this Court in the first place. This case is not like the *Black* case or other cases in which the Solicitor General or this Court or both in conjunction saw fit to favor a remand to a lower Court for a hearing to determine *whether* there was taint *via* electronic activity. To the contrary, this is one of those cases in which both the Solicitor General and this Court have already concluded that constitutionally fatal taint *does exist,* on the record as reviewed by both the Solicitor General and this Court independently, and that all that remains is for the Government to attempt if it can to re-try the defendant on *untainted* evidence, *i.e.,* on evidence *free of the already adjudicated* taint, which is to say that the case may be retried only on evidence other and separate from that which has already been adjudicated as tainted.

But that is not what the Government was asking the Courts below to allow the Government to do. The Government was not asking for retrial of this case on segregatedly "clean" evidence untouched by the *previously adjudicated* taint. Instead, the Government was asking the Courts below to adjudicate, *collaterally,* that the prior evidence which has already been adjudicated as tainted should now be re-adjudged as "clean". It is not even clear whether the Government was also asking the Courts below to find certain portions of the Government's evidence to be separatedly or segregatedly "clean" in the sense of being untouched by this Court's 1966 adjudication of evidentiary taint. It is not clear whether this latter aspect was included in what the Government was asking the Courts below to do because that aspect here became inextricably intermingled with the other aspect, the jurisdictionally and constitutionally forbidden aspect in which the Government was asking these lower Courts to undertake a collateral review of the decision of this Court.

This intermingling was the inevitable result of the Government's choice to press for a *collateral* rejection of this Court's 1966 decision. This choice by the Government brought about an apparently hopeless obscuring of the separate aspect or issue of whether the case can be retried on segregatedly clean evidence untouched by this Court's 1966 decision.

In all probability, it would have been impossible in any event for the Government to mount a constitutionally acceptable corpus of prosecutive proof for retrial of this case, owing to the pervasiveness of the taint adjudicated in 1966. *Theoretically,* wholly or partly *new* proof could have been developed by the Government, but that is not the course which the Government chose.

2. Furthermore, even if the Government might have succeeded in achieving the theoretical possibility of developing "clean" *new* proof, there would persist the serious further problem of the viability of the present indictment, unless the Government could show that there was no fatal taint in the proof on which the Grand Jury returned this indictment. The Government made no showing in the instant hearing record, or anywhere else to our knowledge, that the Grand Jury proofs were thus untainted. This Grand Jury problem goes beyond the familiar problem of whether the Grand Jury proceedings are vitiated by incompetent or constitutionally tainted evidence when other evidence free of such defects was presented to the Grand Jury. Here, if we are correct in our understanding of the meaning of this Court's "independent adjudication" of fatally pervasive taint in this case, the conventional saving factor of the Grand Jury's having received additional legal evidence, could not come into play, for here the whole of the Grand Jury evidence would stand tainted.

Furthermore, here there is present an even more serious problem, now that Judge Weinstein has suppressed all proof of likely source or of any illicit income, for in light of the latter ruling of Judge Weinstein it becomes necessary to confront the *ultimately basic* problem of whether the Grand Jury in this case would have indicted at all on an indictment theory that excluded likely source and illicit income. That is, with likely source and illicit income taken out of this Grand Jury picture retrospectively by virtue of Judge Weinstein's ruling of electronic taint, the question becomes, has Schipani even been afforded at all his constitutional right to indictment by a Grand Jury? Given this radical change of the Grand Jury posture (in light of Judge Weinstein's ruling on likely source and illicit income or activity), does the *in-*

dictment itself survive as being that particular indictment which this particular Grand Jury thought it was handing down?

Further, there is the problem of whether the Government itself would have presented this case at all to a Grand Jury if the likely source and illicit income items had not been deemed available in the Grand Jury picture. This latter problem, as to the prosecution's own position *vis-a-vis* the Grand Jury (retrospectively viewed in light of Judge Weinstein's ruling), is admittedly of lesser constitutional dimension than the companion problem affecting the Grand Jury's own province. But it all adds up to showing just how grotesque the evolution of this prosecution became, in point of both constitutional wrong and of wrongful federal prosecutive policy, in light of the electronic taint factors as they stand on the present record. And this grotesqueness, in turn, but further bespeaks the fatal constitutional disorientation of this remarkable federal prosecution, the disorientation caused by a Federal District Court's having undertaken in effect to pronounce a collateral judgment of reversal against the Supreme Court of the United States.

Further as regards our above remarks concerning the theoretical possibility that the Government might have developed totally new and "clean" proofs, we do not mean to imply that such new proofs would be literally the only method of constitutionally retrying this case.* Theoretically also the Government might retry this case on the basis of such portions of the *prior* proofs which the Govern-

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* When we speak of "constitutionally" retrying this case on totally new proofs we do not recede from the above suggested qualification that such a course would raise its own grave constitutional difficulty in connection with the Grand Jury problem.

ment might demonstrate are outside the area already adjudicated as being tainted. But, again this latter theoretical possibility does not seem to us realistic owing to the pervasiveness of the adjudicatedly tainted items; and again, the Government has not chosen to make a distinct and clear demonstration along such lines.

The foregoing necessarily suggests, we realize, that it is apparently impossible to retry this case at all under any circumstances owing to the factor of the pervasiveness of the 1966 adjudicated taint—or owing to the sheer impossibility of defining just what are the bounds and contents of the adjudicatedly tainted area. This latter suggested impossibility is the result of the Government's own fault in having tainted its case so pervasively, albeit so undefinably, in the first place. And the task of trying to define the bounds and contents of the adjudicatedly tainted area was a task which the Government had to undertake as part of its burden in the proceedings below, but the Government avoided that task, choosing instead to pitch its whole effort on the contention that the 1966 decision of this Court was "error".

3. The conduct of the Courts below is in defiance, moreover of "the law of the case". See 5 Am. Jur. 2d ("Appeal and Error" §§ 744 *et seq.*, 989 *et seq.*) pp. 188 *et seq.*; 19 *A. L. R.* 3d 502 *et seq.*; 87 A. L. R. 2d 271 *et seq.*, collecting the familiar decisions for the axiomatic proposition that a lower Court must obey the terms of the mandate of an Appellate Court. For example, it is stated in 87 A. L. R. 2d at p. 276 that, "Obviously, a decision of a higher appellate court is binding * * * whether the decision is right or wrong". It is stated at 87 A. L. R. 2d p. 280 "* * * that the only remedy available to correct the error is a petition for a rehearing seasonably made after the decision on the former appeal." It is stated in

5 Am. Jur. 2d at pp. 417-418 that "It is the duty of the trial court, on remand, to comply strictly with the mandate of the appellate court according to its true intent and meaning, as determined by the directions given by the reviewing court. No judgment other than that directed by the reviewing court may be entered, even though it may be one that the appellate court ought to have directed."

* * *

(In our closing presentation to the District Court, after the Court had announced its tentative opinion and order and before pronouncement of verdict, we moved (November 1, 1968) for a continuance of the cause pending opportunity to apply to this Court for a correction of Judge Weinstein's interpretation of this Court's order of remand. It was not until the latter stage of the proceedings below that the situation became ripe for such a motion on our part, because we had to await the unfolding of the Government's proof in this second trial and the District Court's manifestation of its views in regard thereto—that is, until the stage just mentioned we were not in a position to pursue our "collateral review" objections because down to that moment it had remained possible that the Government would try to free the case of taint by bringing in *new untainted evidence*, or that the Court below would acquiesce in our "collateral review" objections in light of the Government's failure to adduce any such new untainted evidence. Our request for continuance was denied.)

4. The Courts below erred in ruling that the Government successfully negated electronic taint with respect to all of the first-trial proofs except likely source. Much of the argumentative presentation pertinent to the latter contentions has crept, we fear, into our recitals concerning this topic in the Statement of the Case, *supra*, where

(we realize) our factual recitals frequently crossed over into the area of "argument".

In the Statement of the Case, *supra,* we referred to Judge Weinstein's distinction between the "focusing" phase and the phase of specific items of evidence, in regard to the electronic-taint issues. It was not written in the Stars of the judicially objective issue-framework of this case, on the electronic aspect, that this peculiarly logicalized formulary distinction proposed by Judge Weinstein had to be the only or the right way of judicially approaching the electronic issues. It is familiar to all of us, from the time of our sophomore-year course in college Logic, that one should never let the other fellow formulate the issue, lest the encounter be lost then and there. Judge Weinstein formulated the issue framework here. Before this Court we are free to urge that he be ruled wrong in that formulation.

Accordingly, we respectfully contend that the realistic and fair formulation of the electronic-taint issues is the one found in Mr. O'Brien's memorandum of November 18, 1966 described *supra* (Appendix G hereto, *infra*). Mr. O'Brien, an experienced Government lawyer in this field of criminal income tax prosecutions on the net worth theory, knew that the issue of electronic taint in this case was not one of "focusing" *versus* "specific items" or anything of that sort. Mr. O'Brien knew that the only proper issue was whether, fairly and candidly, the Federal Government lawyers in this case were going to be able to go before a Court and assure that their investigative-prosecutive totality was salvageably free of electronic taint in view of all of the circumstances. Mr. O'Brien knew that that was the only acceptable way to put the issue. And evidently Solicitor General Marshall knew this also. What was not to be expected was that eager-beaver junior

officials of the Department of Justice and the I.R.S. would later presume to foist on a Court their Masetti "exhibit 1" theory—or perhaps this was to be expected in view of the enormous temptation that must lure the prosecutive bureaucratic mentality in situations of this kind, especially in this situation where a prime stake in contemporary constitutional history is involved, the stake of the survival or destruction of the whole "Schipani review proceure". But what was surely never to be expected was that a Federal Court would facilitate such pretensions of career prosecutors.

When one reads Judge Weinstein's opinion on the electronic issue which is printed in Appendix C hereto, *infra* one soon finds oneself in a world of verbal and logical unreality. Judge Weinstein's "focus *versus* specific-item" distinction bears no relation to the actual chronological development of the real-world happenings that were taking place among the several agencies during the Schipani investigation, especially during 1961. The participants in that inter-agency activity were not sitting around contemplating their logical navels to trace out the distinct convolutions of "focus" or of "specific items". Those participants were involved together with each other in an *organic,* real-life action or "gestalt" (to use one of Judge Weinstein's own words). Those participants were all unitedly in pursuit of Joseph Schipani. It is as though one were to inquire of a pack of foxhounds whether, at any moment, they were devoting their pursuit energies to "focusing" on the fox or to "specific-itemizing" on the fox. It is as though one were to inquire of Victor Hugo's Javert whether, in Les Miserables, at any one moment he was "focusing" or "specific-item" questing after Valjean. Logic and good disciplined analytical thinking have their place in the law, to be sure. But surely the "logic" and the "ana-

lysis" with which we have all been favored by the learned District Judge below are not helpful to the proper conduct of the judicial process in this case. Mr. O'Brien, Solicitor General Marshall, the unanimous Justices of this Court, all of those legal thinkers in 1966 discerned the organic or unitary nature of the electronic taint problem in this case. The learned Courts below should have profited by their example.

Actually, the Government's only "showing" with respect to the specifics of the supposedly taint-free evidence under Exhibit 1 consists of the testimony of I.R.S. Agent Masetti, *supra.* But in thus relying on Masetti the Government is relying on a blend of bootstrap-levitation and *petitio principii.* The Government is defying the laws of legal gravity and the logical law which forbids the begging of questions. The bootstrap-levitation aspect is revealed in the fact that Masetti has done noting more than self-servingly testify that he did not know that any of his information had an electronic source. This is unavailing for the Government. The essential question is not what Masetti knows as to ultimate sources of evidence, but what the entire herein involved Federal Law Enforcement Establishment knows *or is chargeable with knowing* as to such sources. The begging of the question by Masetti's testimony and by his Exhibt 1 is expressed likewise in what we have just said. The Government cannot lift its tainted case out of the tainted level by the self-serving testimony of Masetti when the Government's showing fails to negate taint through the activities of the overall Law Enforcement Establishment herein, any more than the Government can successfully meet the ultimate question of taint known to *or reasonably attributable to* that overall Establishment, by placing on stage the single underling Masetti with his claim of "autonomous" ignorance of the obviously universal elec-

tronic taint which surrounds this case like the "Ocean" of classic Greek mythology which encompassed the known world of finite Man.

A comparable fundamentally disturbing item in the Government's case on the electronic issues is the following: The testimony of the ATTU Chief Agent Hay is that his agency was embarked upon a "saturation" focus upon Schipani (228 *et seq., passim*).* ATTU has admitted electronic surveillance at the Pierrepont Health Club in Brooklyn commencing in August 1961. It is perfectly evident from the testimony of Hay and the other ATTU agents that, thanks to their claimedly massive physical surveillance of Schipani during 1961, they must have known that Schipani was frequenting Prisco's Travel Agency, where the F.B.I. had its electronic installation. The immediate and urgent question arises, then, why did not ATTU itself try to conduct electronic surveillance of Prisco's? ATTU's readiness, indeed its ardor, to devote its electronic attentions to Schipani during the times in question speaks out boldly from page after page of the present hearing record, as we have seen. What is the answer to the mystery of why ATTU did not—*if, indeed, it did not*—install an electronic device at this place, Prisco's Travel Agency, which the physical surveillance must have revealed to ATTU as being a place of such frequent resort by Schipani? The answer to this mystery is, we respectfully suggest, *that ATTU knew that the F.B.I. was already taking care of the electronic job at Prisco's.* This inference which we are suggesting seems to us to be so unavoidable in point of the factual logic of the present situation, that we believe we are justified in arguing that it is incredible, practically as a matter of

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* This refers to the transcripts cited in the footnote on p 16, *supra.*

law, that ATTU did not know of the F.B.I.'s electronic activity at Prisco's Travel Agency. And if we are correct in this seemingly inescapable inference, what is left of even the fragments of believability of the Government's entire "showing" in the present hearing record? The credibility of the Government's entire evidentiary showing in this hearing must be concluded to be worthless, for as seen, both the F.B.I. witnesses and the ATTU witnesses were bold enough to swear in this hearing that ATTU had no knowledge of the F.B.I.'s electronic bugging at Prisco's.

Further as to the "focusing" aspect, the record of the suppression proceedings herein cannot support the determination that unconstitutional "focusing" was negated by the Government by "a preponderance of the proof". In that suppression hearing—where the Government had the burden—persons whose testimony was indispensably needed (on the "focusing" issue) were not brought in as witnesses. Where was the First Assistant to the Solicitor General mentionad by Mr. O'Brien as the official who evidently carried forward the November 1966 Departmental Review after Mr. O'Brien's paper was finished? Where, in our suppression hearing, was *anyone* from the Solicitor General's office? The District Court noted in its opinion printed in Appendix C hereto, *infra,* that Mr. O'Brien "did not know if the Solicitor General had additional information or had conducted an independent review. There is no indication in the record that such a review had taken place". We must respectfully ask, whose fault is it that there is no such "indication in the record"? Was it not part of the Government's burden to meet one way or the other, the lack of such "indication in the record"? And where, likewise, were all of the other absent Government-employee witnesses mentioned *supra* whose testi-

mony was needed to fill gaps not only as to the contemporaneous "focusing", but as to the 1966 Departmental review?

5. We submit also that the District Court's enunciation of the "preponderance" test for the "focusing" issue, as distinct from the "reasonable doubt" test (Appendix C, hereto, *infra*) is unsound. An important consideration, mentioned by that Court as favoring the "preponderance" canon for this branch of the case, is comity owed by the Judicial to the Executive Department. We must ask, since when has the Judicial Branch under our Constitution felt itself under comity restraint in enforcing the Constitution against Executive violation?* The whole history of the contemporary rulings of this Court in this electronic monitoring field eschews any such comity considerations.

6. As to the aspects of the District Court's opinion (Appendix C hereto, *infra*) in which taint is found only as to items of "likely source", the very items of administrative chronology and unfolding administrative activity which the Court itself so exhaustively marshaled, the very items which caused the Court to conclude that taint of the "likely source" items had not been negated by the

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* Incidentally, when the District Court evidently gave decisional weight in its opinion (Apendix C hereto, *infra*) to Mr. O'Brien's testimony that he would not have phrased the Solicitor General's previously quoted positive and unequivocal statement in the way the Solicitor General did, the Court was putting a strange gloss on its own "comity" reasoning. It does not seem wise for a Court to pit Executive subordinates against their superior officers (who have not even been heard from on the record), in a setting of judicial reasoning which also posits that the Court is reluctant to intrude itself into the Departmental inner privacies of the co-equal Executive Department.

Government beyond a reasonable doubt—this reasonable doubt test was found applicable by the District Court to this branch of the case, i.e., the branch involving specific evidentiary items as distinct from the "focusing" problem—require equally the conclusion that the Government did not carry beyond a reasonable doubt the burden of negating taint as to the ATTU surveillance which resulted above all in what the Court below repeatedly referred to as the "crucial" money order leads.

7. Referring to our Question Presented no. 6, *supra*, it came out in the "3500" material of F.B.I. agent Shedd in this second trial that the agent had questioned Schipani about one Tony Ricci and that Schipani knew Ricci in Florida. We informed Judge Weinstein (in our paper entitled "Defendant's Statement Of Objections, Motions And Requests After Conclusion Of The Proof At 1968 Re-trial," pp. 17-19) that, from the record on file in this Court in *Desist et al.* v. *United States*, no. 12, Oct. Term 1968, it was known that the name of this same Tony Ricci figured importantly in certain admitted trespassory electronic eavesdropping by the F.B.I. in a Miami, Florida restaurant, where Ricci was the direct target of the F.B.I. bugging over a period which included the herein relevant period from April 1962 to May 1963. We therefore urged Judge Weinstein, in our aforesaid "Statement of Objections" etc. "to compel the Government to make plenary disclosure concerning the Florida bugging of Tony Ricci" (*id.*, p. 19). And we further moved as follows before Judge Weinstein (*ibid.*):

> "* * * For, if Tony Ricci was bugged prior to Agent Shedd's interview with Schipani on May 15, 1959, and if that bugging of Ricci turned up the name of Schipani or any lead to Schipani, such would have an obvious vital bearing on the elec-

> tronic issues of this case. In the first place, it would go to the question of whether Agent Shedd's allegedly pre-electronic information is actually *pre*-electronic. Second, it would be one further important item going to the fundamental due process-Fourth Amendment question of the Government's overall behavior in regard to its duty of full disclosure of its electronic activities affecting this case of Schipani. We therefore move for an order requiring the Government to make a plenary report to the Court and to the defendant concerning the Tony Ricci electronic bugging in Florida."

However, all that Judge Weinstein did concerning this was that he directed the Government to report to him about the Tony Ricci bugging, and he then announced as follows in the opinion printed in Appendix D hereto, *infra* (p. 72a-73a):

> "Electronic eavesdropping involving one Tony Ricci has no bearing in the instant case. At the Court's request, the logs relating to that surveillance were examined by the government. The government has represented that the defendant's name was not mentioned, none of his activities were mentioned, and the defendant's voice was not picked up. Based upon the suppression hearing already had in this case, it is clear that no leads to evidence used against the defendant were obtained as a result of electronic eavesdropping involving Tony Ricci."

The above procedure followed by Judge Weinstein deprived petitioner Schipani of his rights under *Alderman* v. *United States*, 349 U. S. 165. It was not enough for the Court to accept the Government's unilateral representation. Schipani's counsel should have been given the op-

portunity to examine the Tony Ricci logs to make sure, on his own judgment as defense counsel, that no evidentiary leads to Schipani had resulted from that surveillance. In the massive and intricate picture of electronic activity presented by this case, Schipani and his attorney should have ben given that right and opportunity. (We neglected to argue this point before the Court of Appeals, but preserved it before the District Court, as seen from the above quotation.)

8. As regards our motion in the Court of Appeals under the "All Writs" statute (see our heading "Jurisdiction", p. 2, *supra,* and our Question Presented no. 3, *supra*), we submit it was the duty of the Court of Appeals to guard the integrity of this Court's mandate against the impositions of the Government and District Court, that is, to guard the mandate against *ultra vires* collateral review by a lower Federal Court bent upon helping the Government show that the Supreme Court of the United States was "in error" in having laid down "the law of the case" (in this very same case). In any event, this Court's own original jurisdictoin under 28 U. S. C. §1651 may be invoked in such a situation. The Court will please note that the certified record pertaining to our "All Writs" motion in the Court of Appeals is under a separate title and docket number (No. 33753, Joseph F. Schipani, Petitioner, v. Hon. Jack B. Weinstein, United States District Judge for the Eastern District of New York, Respondent). Our "All Writs" motion presented the issue to the Court of Appeals *via* an adoption or an incorporation by reference of our presentation on the same subject in our appeal brief in that Court, the essence of which has been heretofore set forth in this petition for certiorari where we have discussed the Government's and Judge Weinstein's enterprise of going about declaring this Court "in error".

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted, both as to the judgment affirming the conviction, and as to the order denying the motion for relief under 28 U.S.C. §1651.

Respectfully submitted,

JACOB P. LEFKOWITZ
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Joseph F. Schipani

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 692—September Term 1968

(Argued June 25, 1969 Decided August 11, 1969.)

Docket No. 33157

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH F. SCHIPANI,

Appellant.

Before:

HAYS and FEINBERG, *Circuit Judges,*
and JAMESON, *District Judge.**

Appeal from a judgment of the United States District Court for the Eastern District of New York, Jack Weinstein, *Judge,* convicting appellant, upon a trial without a jury, on five counts of willful income tax evasion, in violation of 26 U.S.C., 7201.

Affirmed.

JACOB F. LEFKOWITZ, New York, New York (Abraham Glasser, of counsel), *for Appellant.*

* Senior District Judge of the District of Montana, sitting by designation.

JOHNNIE M. WALTERS, Assistant Attorney General, Lee A. Jackson, Joseph Howard, Cono R. Namorato, Janet R. Spragens, Attorneys, Department of Justice, Washington, D. C. (Vincent T. McCarthy, United States Attorney, for the Eastern District of New York, Jerome C. Ditore, Assistant United States Attorney, of counsel), *for Appellee.*

JAMESON, *District Judge*:

This is an appeal from a judgment of conviction entered December 6, 1968, after trial without a jury, on five counts of willful income tax evasion through failure to file returns for the years 1956-1960 inclusive, in violation of 26 U.S.C. 7201.[1]

Appellant was first found guilty of the same offenses, after a non-jury trial,[2] on October 15, 1965, and was sentenced on December 3, 1965. This conviction was affirmed by this court on June 29, 1966. *United States* v. *Schipani*, 2 Cir. 1966, 362 F. 2d 825. Certiorari was denied on November 7, 1966. 385 U.S. 934, 87 S. Ct. 501, 17 L. Ed. 2d 431.

On November 30, 1966, the Solicitor General filed a supplemental memorandum in the Supreme Court advising

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1 26 U.S.C. 7201 provides in pertinent part:

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony * * * ."

2 Prior to the first trial the parties had waived a jury. Before the second trial the Government moved to withdraw its consent to trial without jury. The motion was resisted and denied, the court holding that the Government's waiver covered "the above entitled case" rather than a particular trial. *United States* v. *Schipani*, E.D.N.Y. 1968, 44 F.R.D. 461.

the Court that material evidence against appellant was based in part on electronic surveillance and suggesting that by reason of this taint the "Court vacate its order denying certiorari, grant certiorari, vacate the judgment of the court of appeals, and remand the cause to the district court for a new trial, should the government seek to prosecute the petitioner anew."[3] On December 12, 1966, acting "(u)pon the suggestion of the Solicitor General and upon an independent examination of the case," the Supreme Court remanded to the district court "for a new trial should the Government seek to prosecute petitioner anew." 385 U.S. 372, 87 S. Ct. 533, 17 L. Ed. 2d 428.

Following remand, appellant filed a motion to suppress all evidence obtained as a result of any electronic surveillance. A full evidentiary hearing on the motion commenced May 6, 1968, and continued for five days. The Government made full disclosure of all available information relating to electronic surveillance of any conversations in which appellant had participated.[4] In a thorough and

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3 The memorandum set forth that it had come to the attention of the Solicitor General that appellant had been a participant in a number of conversations which had been electronically monitored as a result of trespass. The Solicitor General was unable on the basis of information then available to "say * * * that none of the evidence used by the government at petitioner's trial was obtained, either directly or indirectly, from an improper source."

4 With respect to the evidence presented at the hearing, the court said in part:

> "The Government has freely revealed all data available to it. It has presented all the surveillance logs of conversations in which the defendant participated or was mentioned, the files of the Federal Bureau of Investigation, the Alcohol and Tobacco Tax Division of the Treasury Department, the Intelligence Division of the Internal Revenue Service, and the Department of Justice, and the testimony of the many agents and attorneys in the 1961-1963 investigations of the defendant and the 1966 review of their work by the Department of Justice. In addition, the Federal Bureau of Investigation 'case

well-reasoned opinion, Judge Weinstein suppressed all evidence introduced at the first trial relating to appellant's "likely sources of income" [5] and otherwise denied the motion. *United States* v. *Schipani*, E.D.N.Y. 1968, 289 F. Supp. 43.

At the second trial, the entire record of the first trial was received in evidence as an exhibit, pursuant to a stipulation entered into by the Government, appellant, and appellant's trial counsel. Since "likely source" evidence had been excluded, the Government's case rested solely on a negation of all non-taxable sources of income, a theory approved in *United States* v. *Massei*, 1958, 355 U.S. 595, 78 S. Ct. 495, 2 L. Ed. 2d 517.

Following detailed findings, the court concluded: "During each of the years charged in the indictment the defendant had substantial taxable income greatly in excess of six hundred dollars. During each of these years he should have paid a substantial income tax. He failed to file income tax returns and concealed his income wilfully in order to defraud the government of income taxes due by him to the government. The government has proved beyond a reasonable doubt all the elements of the crime charged for each of the years charged in the indictment. The defendant is guilty as charged on all counts." *United States* v. *Schipani*, E.D.N.Y. 1968, 293 F. Supp. 156, 163, 164.

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agent' assigned to the Schipani investigation reviewed all the Federal Bureau of Investigation reports relating to the defendant and underlined all information obtained as a result of electronic surveillance" (289 F. Supp. at p. 45).

5 Each time the case was tried on the "net worth" theory. At the first trial the Government offered evidence of "likely sources" of income, as well as negating all non-taxable sources of income.

I.

Appellant first questions the propriety of the proceedings upon remand and contends that the Government could not constitutionally retry the case on the basis of "first-trial proofs." He argues that the ruling of the district court that there was sufficient taint-free evidence to permit a retrial on the same evidence constituted a "collateral finding" that "the Supreme Court of the United States was 'in error' in having adjudicated to the contrary in deciding the same electronic issues in December, 1966, on the merits and 'upon an independent examination of the case.'"

We do not so read the Court's opinion. It is significant that the Supreme Court, after its "independent examination of the case," did not order a dismissal. Appellant had petitioned for a "remand with direction to vacate the judgment of conviction and to dismiss the indictment." The Court did not grant the petition but instead provided expressly for a "new trial should the Government seek to prosecute * * * anew."[6] Had the Court intended the construction placed upon its order by appellant, it would have granted his motion.

Clearly it was necessary to determine in some manner what evidence was tainted. This the district court did in an extended suppression hearing, with complete disclosure to appellant by the Government of all available information in the Government's files and with an oppor-

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6 A similar procedure of remand for an exclusionary hearing was followed in *United States* v. *Wade*, 1967, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149; *Gilbert* v. *California*, 1967, 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178.

tunity to cross-examine the key agents and investigators who had any knowledge of the electronic surveillance.[7]

The *per curiam* opinion of the Supreme Court did not hold or even suggest that all evidence at the first trial was tainted by electronic surveillance. The Court had been advised by the Solicitor General that some of the leads and evidence were tainted. Neither the Solicitor General nor the Supreme Court had the benefit of the careful analysis and testimony with respect to the sources of all evidence which were available to the district court as a result of the suppression hearing.[8]

The evidence at the suppression hearing disclosed that the F.B.I. had been compiling information on appellant since 1958. In a report dated October 10, 1960, the defendant was described by one source as "one of the most influential and most powerful figures in New York underworld" and "considered to be associated with several of New York's top hoodlums" (289 F. Supp. at p. 46). The first information obtained by electronic surveillance was in 1961 through an investigation of Michael Clemente and covered the "Prisco Travel Bureau, a 'front' for Clemente's criminal activities and a meeting place for many of New York's top mobsters." Although appellant was not the subject of that electronic surveillance, nine conversations in which he participated and 27 others in which he was

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7 The evidence adduced at the suppression hearing included "a painstaking analysis of all the evidence introduced" in the first trial, prepared by the Special Agent of Intelligence in charge of the Schipani investigation, with a member of the staff of the United States Attorney. "The products of their labors was a comprehensive chart which denotes a specific source or sources for each witness and piece of evidence (including 292 exhibits) introduced at the trial" (289 F. Supp. at p. 49).

8 The same is true of the memorandum prepared by James Dewey O'Brien, then the Assistant Chief of the Criminal Section of the Tax Division, upon which appellant heavily relies in support of his contention that all first trial proofs were tainted.

discussed or his name was mentioned were electronically monitored (p. 47).

The district court properly examined all of the evidence in the first trial to determine whether all or only a part was tainted by the electronic surveillance, and whether any untainted portion was independent of and distinguishable from that which was tainted.[9] After a full hearing the court, in a careful opinion, first recognized that "evidence is admitted if it is obtained from an untainted 'independent source' but excluded if it is obtained as a result of the illegality"; that evidence discovered "as a result of both legal and illegal leads" is inadmissible, even though "the legal lead would itself probably have sufficed to uncover the evidence" (289 F. Supp. at p. 54); and that the Government is required to "prove beyond a reasonable doubt that the evidence it introduces was legally obtained" (at p. 59).

Applying the foregoing rules, the court found, *inter alia*, that the only tainted evidence was that relating to a likely source of income; that the "(o)ther evidence of the defendant's net worth was proved beyond a reasonable doubt to be untainted" (at p. 61); that the investigation was not intensified by reason of any tainted information,[10] and that

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9 The proper test is: "(W)hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun* v. *United States*, 1963, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441; *Hoffa* v. *United States*, 1966, 385 U.S. 293, 309, 87 S. Ct. 408, 17 L. Ed. 2d 374; *United States* v. *Wade*, 1967, 388 U.S. 218, 241, 87 S. Ct. 1926, 18 L. Ed. 2d 1149.

10 "The government has established by a preponderance of evidence and possibly by clear and convincing proof—though not beyond a reasonable doubt—that the intensity of its investigation by Intelligence and the Alcohol Tax Division was not affected by tainted information." 289 F. Supp. at p. 64.

(*footnote continued on next page*)

it was "highly likely that the government would have launched a saturation investigation * * * even if no information had been received from electronic surveillance of the Prisco Travel Bureau" [11] (at p. 64).

We approve the legal principles applied. The findings were not clearly erroneous. They were supported by substantial evidence.

II.

Appellant's next contention that the evidence was insufficient to sustain a conviction was considered by this court on the appeal from the first conviction.[12] As noted *supra*, at each trial the Government relied on the "net worth" theory.[13] The evidence of "likely source" income accepted

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The court had previously concluded that proof showing that the intensity of the investigation was not the result of tainted information was satisfied by a preponderance of the evidence.

11 In reaching this conclusion the court relied in part upon the untainted F.B.I. report of October 10, 1960, *supra*, and "additional leads * * * through acceptable investigative techniques. Defendant had never filed an income tax return although he obviously enjoyed a high standard of living. Immediately after the investigation began, the defendant appeared so vulnerable and the likelihood that an income tax investigation would prove fruitful was so great, that government agents would naturally focus on him" (289 F. Supp. at p. 64).

12 In view of the factual background contained in the prior opinion of this court (362 F. 2d 825) and the detailed findings of Judge Weinstein in his order following the suppression hearing (289 F. Supp. 43) and in his opinion following trial (293 F. Supp. 156), we do not deem it necessary to set forth the evidence in detail in this opinion.

13 In a net worth case, the Government "attempts to establish an 'opening net worth' or total net value of the taxpayer's assets at the beginning of a given year. It then proves increases in the taxpayer's net worth for each succeeding year during the period under examination and calculates the difference between the adjusted net values of the taxpayer's assets at the beginning and end of each of the years involved. The taxpayer's non-deductible expenditures, including living expenses, are added to these increases, and if the resulting figure for any year is substantially greater than the taxable income reported by the taxpayer for that year, the

at the first trial was excluded at the second trial. The evidence negating non-taxable income, however, was identical at the two trials.

In affirming the first conviction, this court found that the "totality of circumstances shown by the evidence" supported the conclusion that no "cash hoard" ever existed; that the "absence of such a reserve fund was established as part of the Government's prima facie case" and appellant "remained quiet at his own peril."[14] The opinion pointed out that the appellant had not suggested any "non-taxable sources other than a cash hoard" and that "the Government negatived all other reasonably possible sources from which Schipani could have acquired non-taxable funds." It was held that, "Under the circumstances, proof of 'a likely source' of net worth increases is not necessary," relying on *United States* v. *Massei, supra,* and other cases cited. (362 F. 2d at 830.)[15]

We adhere to our conclusion that it was not necessary to rely upon a "likely source" of net worth to sustain a conviction, and hold that after the elimination of all evi-

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Government claims the excess represents unreported taxable income. In addition, it asks the jury to infer willfulness from this understatement, when taken in connection with direct evidence of 'conduct, the likely effect of which would be to mislead or to conceal.' Spies v. United States, 317 U.S. 492, 499." *Holland* v. *United States*, 1954, 348 U.S. 121, 125, 75 S. Ct. 127, 99 L. Ed. 150, rehearing denied 348 U.S. 932, 75 S. Ct. 334, 99 L. Ed. 731.

14 Appellant did not offer any evidence at either trial, but relied on insufficiency of the Government's proof.

15 Appellant recognizes that this issue was determined adversely to his contention in our opinion affirming conviction on the first appeal, but argues that the "inartistic reference to a 'reasonably' proved negation of 'all possible' non-taxable source under the Massei case" was an unwarranted extension of the *Massei* rule and does not find support in other cases construing *Massei*. We find nothing in the cases cited by appellant contra to our construction of *Massei* as applied to the facts of this case.

dence of "a likely source," the evidence was still sufficient to prove guilt beyond a reasonable doubt.

With respect to appellant's contention that the Government failed to establish the element of "willfulness," Judge Weinstein sets forth in detail the factors showing "a pattern consistent only with that of a guilty mind" (293 F. Supp. at 161). We agree with his conclusion. The factors enumerated in his opinion are essentially the same as those considered by this court in its prior decision (362 F. 2d at 831).

III.

This court also considered on the prior appeal appellant's contention that the trial court erred in admitting into evidence the prison record of a statement given by appellant to a prison official in February, 1943, that he had only $1350 in cash which he had left with his wife. The statement was offered to show appellant's net worth in 1943 as a starting point in proving his net worth at the beginning of the indictment period. The statement was given in the course of a routine interrogation by prison authorities relating to Schipani's personal history. It was unrelated to any pending investigation of a criminal offense, and particularly bore no relationship to the present case, which was not initiated until many years later. We adhere to our prior holding that there is no basis for appellant's claims that this statement constituted an involuntary or incriminatory statement in violation of appellant's Fifth Amendment rights and was an unlawful search and seizure in violation of the Fourth Amendment.[16]

16 The cases upon which appellant relies are factually distinguishable in that the statements under consideration in those cases were given in connection with the investigation of the accused.

IV.

Finally, appellant complains of the conduct of the trial judge, first in "refashioning * * * an indispensable element in the formulation and proof of the indictment charges." In the first trial, the Government relied upon the "presumption of innocence" arising from the failure to file returns in pre-indictment years. This court held this approach improper, and the trial judge properly called this conclusion to the Government's attention. In following the suggestion of this court (362 F. 2d at 829-30) the district court did not abuse its discretion.

Nor is there merit in appellant's contention that he was denied a fair trial by the "infection of the record with reference to his alleged notorious criminal background." As noted *supra,* appellant resisted the Government's motion to withdraw its consent to a trial without jury. The motion was denied by reason of the trial court's conclusion that there was "a substantial danger that the defendant will be severely prejudiced if he is tried before a jury" (44 F.R.D. at 463), based in large part upon the testimony in the suppression hearing with respect to defendant's criminal activities. In an order entered October 14, 1968, Judge Weinstein granted appellant's motion to strike all references to appellant's alleged background of illicit activities, saying in part: "The Court will not base its decision on the defendant's criminal background, if any." We find no evidence that the trial court gave any weight to the evidence of appellant's criminal activities in arriving at the guilty verdict. The proof was sufficient without considering this evidence.

Appellant also complains of the court's reference to appellant's "demeanor and general appearance," in view of

the fact that appellant did not take the stand. We agree with the district court that, "The trier's observation of the non-witness defendant's demeanor and general appearance may be—and almost invariably is—considered by him in evaluating evidence introduced at the trial (citing cases)." Moreover, Judge Weinstein specifically stated that "• • • the conclusion that defendant was guilty beyond a reasonable doubt was reached solely on the record."

Affirmed.

APPENDIX B

Opinion of the United States District Court
(May 10, 1968, Weinstein, D. J.)

(Reported in 44 F. R. D. 461 (1968))

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH F. SCHIPANI,

Defendant.

No. 63 CR 237.

United States District Court
E. D. New York.

May 10, 1968.

Prosecution for income tax evasion. The United States Supreme Court vacated judgment of conviction and remanded cause for new trial, 385 U. S. 372, 87 Sup. Ct. 533, 17 L. Ed. 2d 428. On motion by the United States to withdraw its consent to trial without jury, the District Court, Weinstein, J., held that where government sought to prosecute income tax evasion case on same, rather than upon superseding indictment and government's waiver of jury trial covered "the above entitled case"

rather than particular trial, waiver was not limited to first trial but would be applicable to subsequent trial on same indictment.

Motion denied.

* * *

Joseph P. Hoey, U. S. Atty. for Eastern District of New York, Brooklyn, N. Y., for plaintiff; Eldon F. Hawley, U. S. Department of Justice, of counsel.

Jacob P. Lefkowitz, New York City, for defendant.

MEMORANDUM AND ORDER

WEINSTEIN, District Judge.

The defendant, Joseph F. Schipani, was found guilty in this Court of five counts of income tax evasion on October 15, 1965. He was tried by the Court without a jury since both the government and defendant consented to a waiver of a jury trial. The conviction was affirmed by the Second Circuit (632 F. 2d 825) and the Supreme Court denied certiorari on November 7, 1966 (385 U. S. 934, 87 S. Ct. 293, 17 L. Ed. 2d 214).

On November 30, 1966, the Solicitor General filed a supplemental memorandum with the Supreme Court which suggested that "the Court vacate its order denying certiorari, grant certiorari, vacate the judgment of the court of appeals, and remand the cause to the district court for a new trial, should the government seek to prosecute petitioner anew." The basis for this suggestion was the discovery by attorneys in the Department of Justice that the defendant had been a participant in a number of conversations which had been electronically monitored as a re-

sult of a trespass. This electronic surveillance took place during the period when much of the evidence used at the trial was discovered. Thus, the Solicitor General was unable, on the basis of the information then available to him, to "say * * * that none of the evidence used by the government at petitioner's trial was obtained, either directly or indirectly, from an improper source."

The Supreme Court, acting on this suggestion, vacated the judgment and remanded "the cause to the district court for a new trial, should the Government seek to prosecute petitioner anew." 385 U. S. 372, 87 S. Ct. 533, 17 L. Ed. 2d 428.

Following a detailed analysis of the hundreds of exhibits and the testimony of the many witnesses relied upon at the trial, the Government concluded that none of the evidence it utilized was tainted. It has decided to continue the prosecution.

Defendant moved to suppress and a full evidentiary hearing was held before this Court. The Government freely revealed all data available to it. It presented all the relevant surveillance logs; the files of the Federal Bureau of Investigation, the Alcohol and Tobacco Tax Division of the Treasury Department, the Intelligence Division of the Internal Revenue Service; and the Department of Justice; and the testimony of the many agents and attorneys involved in the 1961-1963 investigations of the defendant and the 1966 review of their work by the Department of Justice.

At the outset of the hearing the government made known its view that the second trial, if it should be had, should be before a jury. The defendant strongly indi-

cated his desire to be tried a second time without a jury. The issue of the form of the trial has been briefed and argued. The parties have agreed that "whatever motions are required under 23(c) to raise the issue of the right to a jury trial have been made."

The Court reserves decision on the suppression motion. The government's motion to withdraw its consent to a non-jury trial is denied.

Subdivision (a) of rule 23 of the Federal Rules of Criminal Procedure requires the consent of the defendant, the government and the Court to a waiver of a jury trial. See Singer v. United States, 380 U. S. 24, 85 S. Ct. 783, 13 L. Ed. 2d 630 (1965). The rule provides:

> "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."

Prior to the first trial such a jury waiver was signed by defendant and his attorney; the United States Attorney "Consented" and a District Judge of this Court "Approved." The body of the document they executed reads as follows:

> "Waiver Of Trial By Jury
> Criminal No. 63-CR-237
>
> IT IS HEREBY STIPULATED, CONSENTED TO AND AGREED by and between the defendant Joseph F. Schipani and the United States of America that the above-entitled case in which the defendant Joseph F. Schipani is charged with violations of Title 26, United States Code, Section 7201, be tried by the Court

without a jury; and the defendant herein, being advised of his right to a trial by jury in this case, hereby waives his right in open court to a trial by jury."

[1] The waiver covers "the above-entitled case"—"Criminal No. 63-CR-237"—rather than a particular trial. The government is seeking to prosecute this case on the same, rather than upon a superseding, indictment and the waiver, by its terms, is not limited to a single trial. It is not unreasonable to construe it as applying to any trial of this indictment.

The court has not been able to find any direct authority on whether a waiver of a jury at the first trial is binding at a subsequent trial in the same criminal case. The civil cases cited by the government are not decisive; they appear to rest on the proposition that where the first trial was on an agreed statement of facts, the parties should not be precluded from introducing new evidence on the second trial. See, i.g., Northern Pacific Ry. Co. v. Van Dusen Harrington Co., 34 F. 2d 786 (D. Minn. 1929) (first trial on agreed statement); F. M. Davies & Co. v. Porter, 248 F. 397 (8th Cir. 1918) (no discussion, merely cites Burnham); Burnham v. North Chicago St. Ry. Co., 88 F. 627 (7th Cir. 1898) (first trial on agreed statement). The form of the stipulation in these civil cases was apparently substantially different from the one before us.

The defendant contends that the stipulation agreed to prior to the first trial is still in effect, while it is the government's position that the stipulation is limited to the trial in which the waiver was made and thus its consent must be given anew. If the case is in the posture

defendant suggests—and, as already noted, the form of the waiver supports him—then this Court has discretion to allow the waiver to be withdrawn. See, e.g., McCranie v. United States, 333 F. 2d 307 (5th Cir. 1964); Orfield, Trial By Jury in Federal Criminal Procedure, 1962 Duke L. J. 29, 77 (1962). If the government is correct then its consent to a waiver normally would be required. Singer v. United States, 380 U. S. 24, 85 S. Ct. 783, 13 L. Ed. 2d 630 (1965).

As the Supreme Court recently indicated in the *Singer* case, however, there may be "some circumstances" in which the government's insistence on a jury trial would be unreasonable:

> "We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial. Petitioner argues that there might arise situations where 'passion, prejudice * * * public feeling' or some other factor may render impossible or unlikely an impartial trial by jury. However, since petitioner gave no reason for wanting to forego jury trial other than to save time, this is not such a case, and petitioner does not claim that it is." 380 U. S. at 37-38, 85 S. Ct. at 791.

Whatever view is proper, whether it is an issue requiring exercise of the trial judge's discretion or a question of the presence of special circumstances which render the government's refusal to consent to a non-jury trial

unreasonable, this defendant is entitled to be tried by the Court without a jury if he so desires.

[2] There is a substantial danger that the defendant will be severely prejudiced if he is tried before a jury. The government is trying this case on a net worth theory. Its starting point is a 1943 statement made to prison officials by defendant upon entering prison that he had no assets. Thus, a jury would be immediately apprised that the defendant had a prior criminal record. There is, in addition, the distinct possibility that a jury would link the defendant with organized crime and weigh this against him in determining guilt. Defendant's entire way of life, including his expenditures, his associates, his leisure activities and his style, together with the lack of any indication of legitimate sources of income, reeks with the odor of organized crime. In a net worth case where all facets of the defendant's financial history, including likely sources of income, will have to be fully explored (see Holland v. United States, 348 U. S. 121, 75 S. Ct. 127, 99 L. Ed. 150 (1954); United States v. Massei, 355 U. S. 595, 78 S. Ct. 495, 2 L. Ed. 2d 517 (1958) (per curiam)), no disinfecting admonition by the Court and no minor exclusions of evidence can prevent the jury from becoming aware of the stench. Moreover, at the suppression hearing which has just been completed, there was testimony to the effect that beginning in 1961 the defendant, along with other suspected hoodlums, had been the "target" of an intensive investigation by the Department of Justice's Organized Crime Division. The names of well-known mobsters and derogatory information were spread in the record. The presence of numerous spectators at this week-long hearing raises the possibility that such information

will be conveyed to members of a jury through conversation overheard in courtroom corridors.

The government's motion to withdraw its consent to a trial without a jury is denied.

So ordered.

APPENDIX C

Opinion of the United States District Court
(July 26, 1968, Weinstein, D. J.)

(Reported in 289 F. Supp. 43 (1968))

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH F. SCHIPANI,

Defendant.

No. 63 CR 237.
United States District Court
E. D. New York.

July 26, 1968.

Income tax evasion prosecution, on remand from the United States Supreme Court at 385 U. S. 372, 87 S. Ct. 533, 17 L. Ed. 2d 428. Defendant moved to suppress evidence. The District Court, Weinstein, Jr., held that the government had burden to prove beyond reasonable doubt that evidence in question had not been obtained as result of illegal electronic surveillance, and failed to meet that burden as to certain evidence, but that it was required to prove only by preponderance of evidence that the total investigation was not substantially affected by the illegal leads, and sustained that burden.

Motion granted in part and denied in part.

See also, D. C., 44 F. R. D. 461.

Appendix C

Joseph P. Hoey, U. S. Atty., for the Eastern District of New York, Brooklyn, New York, for plaintiff; Eldon F. Hawley, U. S. Dept. of Justice, of counsel.

Jacob P. Lefkowitz, New York City, for defendant.

OPINION AND ORDER

WEINSTEIN, District Judge.

The Supreme Court, upon being informed by the Solicitor General that the defendant, Joseph F. Schipani, was a participant in a number of conversations which had been electronically monitored by agents of the Federal Bureau of Investigation and which led to the use of tainted evidence against the defendant, vacated the defendant's conviction for income tax evasion, and remanded "the cause to the district court for a new trial, should the Government seek to prosecute * * * anew." 385 U. S. 372, 87 S. Ct. 533, 17 L. Ed. 2d 428. Following a detailed analysis of the hundreds of exhibits and the testimony of the many witnesses relied upon at the trial, the government concluded that none of the evidence that it utilized was tainted and that "the Solicitor General was in Error" when he informed the Supreme Court to the contrary. Government's affidavit in Reply to Defendant's motion for Suppression of Evidence, p. 2 (Emphasis in original). Consequently, it has decided to prosecute anew.

Defendant has moved to suppress and a full evidentiary hearing has been held. The Government has freely revealed all data available to it. It has presented all the surveillance logs of conversations in which the de-

fendant participated or was mentioned, the files of the Federal Bureau of Investigation, the Alcohol and Tobacco Tax Division of the Treasury Department, the Intelligence Division of the Internal Revenue Service, and the Department of Justice, and the testimony of the many agents and attorneys in the 1961-1963 investigations of the defendant and the 1966 review of their work by the Department of Justice. In addition, the Federal Bureau of Investigation "case agent" assigned to the Schipani investigation reviewed all the Federal Bureau of Investigation reports relating to the defendant and underlined in red pencil all information obtained as a result of electronic surveillance.

This evidence has been examined to obtain answers to two questions. First, whether the entire investigation of the defendant was tainted because its intensity was substantially affected by the electronic surveillance. Second, whether individual items of evidence used at the first trial, were obtained, either directly or indirectly, as a result of illegal monitoring. For the reasons stated below, the first question is answered in the negative and the second in the affirmative.

I. Facts

A. *Prior Proceedings*

On October 15, 1965, after a non-jury trial, the defendant was found guilty in this Court of willfully attempting to evade the payment of income taxes for the years 1956 through 1960. 26 U.S.C. § 7201. The case was tried on a "net worth" theory. The evidence showed that the defendant had a certain net worth at the beginning of 1956 and an increase in net worth at the end

of that year and each succeeding year during the indictment period. The defendant kept no books, failed to file returns for any of the years covered by the indictment, and adduced no proof at the trial.

The defendant's financial practices were characterized by the trial court as being "marked by concealment through use of the names of others, failure to keep records in transactions when record keeping is usual and absence suspicious, extensive use of Manufacturers Trust Co. personal money orders, and large transactions in which currency was used." United States v. Schipani, 63-CR-237, October 15, 1965, E. D. N. Y., p. 7. The most damaging evidence against the defendant were the money orders. Through them were traced many of defendant's financial transactions and upon them the government based its computation of the defendant's yearly gross income. In addition, the trial court found that the defendant had likely sources of income from an interest in a restaurant and as a negotiator in labor-management relations.

The conviction was affirmed by the Second Circuit (362 F. 2d 825). Certiorari was denied on November 7, 1966 (385 U. S. 964, 87 S. Ct. 293, 17 L. Ed. 2d 214).

On November 30, 1966, the Solicitor General filed a supplemental memorandum with the Supreme Court which suggested that "the Court vacate . . . the judgment . . . ." The basis for this recommendation was the discovery by attorneys in the Department of Justice that the defendant had been a participant in a number of conversations which had been electronically monitored as a result of a trespass by agents of the Federal Bureau of Investigation. This electronic surveillance began a short time prior to the commencement of the investigation of the defend-

ant for tax violations and continued during the period when much of the evidence introduced at the defendant's trial was uncovered.

In his memorandum to the Supreme Court, the Solicitor General stated:

> "The substance of the monitored conversations involving petitioner and others was recorded in logs kept by the F.B.I. agents who conducted the electronic surveillance and was reflected in various F.B.I. reports which came to the attention of those in charge of investigating and prosecuting petitioner for possible tax violations. The reports did not disclose the manner in which the information contained therein had been obtained.
>
> "Unlike the situation in Black v. United States, 385 U. S. 26 [87 S. Ct. 190, 17 L. Ed. 2d 26] (1966), we cannot say in the instant case that none of the evidence used by the government at petitioner's trial was obtained, either directly or indirectly, from an improper source. Some of the material in the F.B.I. reports (which were based in part on the electronic surveillance) provided investigatory leads and other information used in proceeding against petitioner. Since ther was material evidence against petitioner which was tainted, his conviction cannot stand, and no purpose would be served here in having the district court conduct a collateral hearing, such as was suggested by the government in its memorandum in Black."

Appendix C

In addition, the Solicitor General disclosed that while his memorandum was being prepared, it was learned that the Alcohol and Tobacco Tax Division had engaged in electronic surveillance of another establishment frequented by the defendant. On the information available to him at that time, which admittedly was incomplete, the Solicitor General advised the Court that it "appears that * * * no relevant information" was obtained from this source.

B. Roles of Government Agencies in Case

Four government agencies played a role in the events which culminated in the prosecution of the defendant for income tax evasion—the Federal Bureau of Investigation (F.B.I.), the Organized Crime and Racketeering Section of the Justice Department (Organized Crime Section), the Intelligence Division of the Internal Revenue Service (Intelligence), and the Alcohol and Tobacco Tax Division of the Treasury Department (Alcohol Tax Division). The role of each of them in the Schipani case will be examined with a view towards determining what effect, if any, the information obtained by the F.B.I. had on the investigations being conducted by the other three agencies.

1. *F.B.I.*

The F.B.I. was the first government agency to take an interest in the defendant. It had been compiling information on him since 1958. In an F.B.I. report dated October 10, 1960, the defendant was described by one source as "one of the most influential and powerful figures in the New York underworld" and considered to be associated with several of New York's top hoodlums. He was reported to have "inherited" the gambling interests of Joe

Adonis and was suspected of being the owner of the Casa Bianca Restaurant and of having an interest in two others, the Hampshire House and Gurney's Inn. An earlier F.B.I. report identified him as being in control of an association of private carting companies. During the period between 1958 and 1960, the F.B.I. appears to have pursued its investigation of the defendant without any intention of initiating a criminal prosecution.

In January of 1961 the F.B.I. acquired a new and productive source of information concerning the defendant's activities. As part of its investigation of one Michael Clemente, an associate of the defendant's, the F.B.I. installed a microphone in the Prisco Travel Bureau, a "front" for Clemente's criminal activities and a meeting place for many of New York's top mobsters. This device was in operation from January 10, 1961 to January 31, 1963.

Although the defendant was not the subject of this electronic surveillance, nine conversations in which he was a participant and twenty-seven others in which he was discussed or his name was mentioned, were electronically monitored. The defendant's voice was first picked up on March 2, 1961; on three occasions prior to that date, beginning on January 12, 1961, his name was mentioned and his activities were discussed by Clemente and others.

The information obtained from this method of surveillance confirmed the F.B.I.'s belief that the defendant was intimately associated with many of the top figures in the Brooklyn underworld and revealed several of his current illicit activities. Numerous conversations were monitored concerning the defendant's role in a private association of New York carting companies and his concealed inter-

est in one such concern. In addition, information was obtained concerning the defendant's involvement with the sale of Puerto Rican sweepstakes tickets on the New York docks, his partial ownership of the Casa Bianca Restaurant, and his control of a New York labor union local.

The further activities of the F.B.I. in the Schipani case were not developed. In February, 1962, it announced to the Alcohol Tax Division its intention to launch a saturation investigation of the defendant's interests in the carting field. No evidence was adduced at the suppression hearing to indicate whether or not this plan was carried out, and, if so, with what results. No evidence, if any, resulting from the carting investigation by the F.B.I. was introduced at the trial.

2. *Organized Crime and Racketeering Section of the Department of Justice*

The appointment of Robert F. Kennedy as Attorney General in January of 1961 inaugurated a new phase in the fight against organized crime in the United States. The Attorney General decided that organized crime presented a national as well as a local problem and that only the federal government, with an organization as broad as that of the criminal syndicates, could effectively combat it.

To implement this concerned drive, an area coordinator in the Organized Crime Section was designated to select as "targets" for investigation those individuals suspected of being part of the organized crime network in the United States. The numerous federal law enforcement agencies involved in these investigations were ordered to cooperate and exchange information with each other and

to synchronize their activities as much as possible. In order to facilitate this effort, all agencies were required to send in periodic progress and intelligence reports to the Organized Crime Section.

One of the targets selected for investigation as part of this program by the area coordinator, Philip Wilens, was the defendant. In a memorandum dated January 31, 1961, Wilens recommended that two investigations of the defendant be initiated; one by Intelligence into the defendant's "gambling activities in order to determine if there is available evidence of wagering tax violations" and the other by Alcohol Tax "to determine if Schipani has filed or caused to be filed falsified Forms 11 in applying for the retail liquor dealer stamps for these premises [Casa Bianca Restaurant, Hampshire House, and Gurney's Inn]."

Wilens testified categorically that this decision was based solely upon information obtained from the F.B.I. report of October 10, 1960. The data about the defendant's suspected criminal activities in the Wilens memorandum was essentially a summary of this F.B.I. report. In addition, Wilens stated that this report constituted the only information he (and, to the best of his knowledge, any one else in his department) had about the defendant at that time and that he had no knowledge of any electronic surveillance of the defendant or any one connected with the case.

Wilen's recommendation with regard to an investigation of the defendant was accepted. By letters dated February 14, 1961 and February 27, 1961, the Alcohol Tax Division and Intelligence were requested to conduct investigations of the defendant. These letters were dictated

by Wilens for his Chief's signature sometime between January 31, 1961 and February 6, 1961. They are set out below (Silberling succeeded Hundley as Chief of the Organized Crime Section between the time the two letters were sent):

"2/14/61

Mr. Dwight E. Avis
Director, Alcohol and Tobacco
Tax Division
Internal Revenue Service
Washington 25, D.C.

Re: Joseph Frank Schipani, Brooklyn,
New York FBI No. 571946

Dear Mr. Avis:

. . .

This person is believed to have acquired undisclosed interests in the following retail liquor dealer establishments: Casa Bianca Restaurant and Cocktail Lounge, 4th Avenue and 100th Street, Brooklyn, New York and Hampshire House Restaurant, 339 Merrick Road, Rockville Center, Long Island, New York. His wife is believed to own 10 shares stock in Guiney's [sic] Inn, Inc., On the Brink of the Beach, Montauk Point, Long Island, New York.

The Attorney General has directed that we request your division to undertake investigations regarding whether Schipani has filed, or caused to be filed, falsified Forms 11.

In the event your files presently contain information relating to Schipani and his activities, we

would appreciate receipt thereof. Also, if you desire further details concerning Schipani's activities, they can be obtained by you from the Federal Bureau of Investigation.

Sincerely,

WILLIAM G. HUNDLEY
Special Assistant to the
Attorney General"

"February 27, 1961

Mr. H. Alan Long
Director
Intelligence Division
Internal Revenue Service
Washington, D. C.

Re: Joseph Frank Schipani,
Brooklyn, New York
FBI No. 571946

Dear Mr. Long:

The subject of this letter, Joseph Frank Schipani, is reputed to be a major racketeer in the Brooklyn, New York area and is said to have succeeded to the Brooklyn gambling interests of Joe Adonis.

In this regard he is supposed to be operating a handbook in the area of 42nd Street and 3rd Avenue, Brooklyn, New York, which covers the entire Bay Ridge section. He is also said to have an in-

terest in a handbook operating in the general area of 5th Avenue in Brooklyn.

The Attorney General has directed that we request your Division to undertake an investigation of the activities of this person with regard to possible wagering tax violations.

If your files presently contain any information regarding this subject, we would greatly appreciate receipt thereof.

Sincerely,

EDWIN SILBERLING
Chief, Organized Crime and
Racketeering Section
Criminal Division"

3. *Investigations Conducted by Alcohol and Tobacco Tax Division and Intelligence Division of Internal Revenue Service*

(a) *Liaison with F.B.I.*

After the Supreme Court's remand of this case, the Special Agent of Intelligence in charge of the Schipani investigation, Albert Masetti, together with a member of the United States Attorney's staff, made a painstaking analysis of all the evidence introduced at the Schipani trial. The product of their labors was a comprehensive chart which denotes a specific source or sources for each witness and piece of evidence (including 292 exhibits) introduced at the trial.

This chart indicates that none of the agents involved in the investigation obtained leads from the electronic sur-

veillance by the F.B.I. and that all the leads they did get were through legitimate techniques—routine investigatory procedure, a mail watch, and physical surveillance and observation of the defendant. Special Agent Masetti testified that he received no leads other than those indicated on the chart. The defendant has stipulated that the chart is accurate insofar as the leads shown on it were used, but not insofar as it suggested that there were no other leads.

Masetti and the Alcohol Tax Division agents assigned to the case emphatically maintained that they had no knowledge, either personal or hearsay, of any electronic surveillance being conducted by the F.B.I., although they had met with F.B.I. officials in New York several times during the course of their investigations. Masetti's predecessor as agent-in-charge of the Schipani investigation reported in his work sheet that on March 22, 1961, he examined the files of the F.B.I.; however, a reading of his notes indicates that he was only shown the F.B.I.'s report of October 10, 1960.

The several F.B.I. agents who had been involved in the Schipani case corroborated this testimony; they stated that they had never informed Intelligence or the Alcohol Tax Division of any electronic surveillance. Further, and more to the point, they testified categorically that, in spite of the Attorney General's directive that there be a full exchange of information and cooperation between government law enforcement agencies, it was the practice of the F.B.I. at that time not to disclose to any other agency any information obtained through electronic surveillance. As the supervisor of the F.B.I. criminal intelligence squad in New York, James P. Mansfield, put it, "It was our

policy at that time not to disseminate information obtained from technical sources." Such information, it was explained, was only available within the F.B.I. itself on a "need-to-know" basis.

Despite this independent policy of the F.B.I., it is not improbable that the information obtained through electronic surveillance was funnelled up to the Organized Crime Section in Washington and then down to local agents of Intelligence and the Alcohol Tax Division. As the Solicitor General pointed out in his brief, such information was reflected in the periodic reports prepared by the F.B.I. on the defendant. Copies of these reports were sent to the F.B.I.'s Washington office. The F.B.I. agents who testified at the hearing could not state that there was no dissemination by the Washington office. Intelligence reports were regularly filed by the F.B.I. with the Organized Crime Section as part of the Attorney General's drive on organized crime and it is possible that these reports, if not the same ones sent to F.B.I. headquarters by its New York office, nevertheless contained information obtained through the electronic surveillance of the Prisco Travel Bureau.

This conclusion is supported by an examination of the Alcohol Tax Division status reports on the Schipani investigation, all of which were forwarded to Special Agent Masetti and the Attorney General's office. These reports are replete with references to information received from a "confidential source"—possibly the F.B.I.'s electronic device—concerning the defendant's involvement in the carting industry. Also contained in these reports are descriptions of several conferences with Gerald Shur, the successor to Philip Wilens as Area Coordinator, and in-

stances of intelligence data being received from the Organized Crime Section in Washington. For example, the report dated June 23, 1961, states that "[d]uring the past period a communication has been received * * * from the Chief, Organized Crime * * * Section * * * to the effect that Benny Ladner, Ralph Russo, Ralph "The Chef," and Joseph Schipani are partners in the Casa Bianca." And in the report of March 1, 1962, mention is made of a conference held in the office of the Assistant Regional Commissioner of the Alcohol Tax Division on February 14, 1962, at which "it was decided that the investigation into the carting companies be suspended for approximately six weeks to prevent conflicts with the F.B.I.'s plan to launch a saturation investigation of Joseph Schipani's interest in this field."

The attorney in the Department of Justice who conducted the 1966 review of the Schipani case, Dewey O'Brien, reached the conclusion that there was substantial cooperation between the several agencies involved in the case. In his memorandum dated November 18, 1966, he noted, for example, that on July 12, 1961—five days before the I.R.S. was requested to conduct a "saturation" investigation of the defendant "because of information 'supplied us by other investigative agencies'"—Shur reported "on a field trip on the case in which he talked to agents of the different agencies." O'Brien wrote:

> "In a letter of June 9, 1961, from Silberling to Avis of ATU, Silberling said it had come to their attention that Benny Ladner, listed as a witness in SAR (and others) and Schipani were partners in Casa Bianca; that 'it has been reported that Michelino Clemente has been attempting to purchase Casa

Appendix C

> Bianca over a period of several months and has been dealing with Schipani.' In a memo, Shur reported (7/12/61) on a field trip on the case in which he talked to agents of the different agencies. By letter of July 17, 1961, Mr. Miller asked Mr. Caplin for a 'saturation investigation' because of information 'supplied us by other investigative agencies.' Another letter (10/19/61) to Alan Long gave a full report on Schipani and said 'the following information was obtained from recent reports of the FBI' and referred to the Casa Bianca and the report that Schipani controlled the garbage disposal unions in Brooklyn."

A finding that information obtained from electronic surveillance may have been transmitted to Intelligence and the Alcohol Tax Division does not reflect doubt about the credibility of Philip Wilens or the various agents who testified that they were unaware of such surveillance. The source or sources for data contained in F.B.I. reports is denoted by codes which are not appended to a report when it is circulated outside the agency; only persons within the F.B.I. could determine the source of intelligence information contained in these reports. Thus, Wilens, upon being shown an F.B.I. report based in part upon electronic surveillance, testified that he would not be able to tell whether any particular entry in the report was derived from this method of surveillance and that he might make such information available to another agency without being aware of its source. In turn, Intelligence and Alcohol Tax agents admitted that they had received leads from Washington without knowing their source.

Appendix C

(b) *Alcohol and Tobacco Tax Division Investigation*

The Alcohol Tax Division played a decisive role in amassing the evidence utilized at the defendant's trial, particularly with regard to the crucial money order lead. As noted above, on February 14, 1961, Dwight E. Avis, the Director of the Alcohol Tax Division, was requested by the Organized Crime Section to begin an investigation into the defendant's suspected undisclosed interests in three restaurants. On March 3, 1961, Avis forwarded the letter to the Alcohol Tax Division's Assistant Regional Commission in New York with instructions to conduct a "top priority" investigation, but within narrowly confined limits:

"Mar—3 1961

Assistant Regional Commissioner
Alcohol and Tobacco Tax
New York, New York

As a part of the Government's drive against organized crime the Attorney General has requested this Division to give top priority to the investigation of the possible undisclosed interests which certain major racketeers may have in the ownership and operation of liquor establishments.

* * *

* * * We also believe that your investigation should be confined to the development of such evidence or information as may be obtained by inspection of the premises, examination of the records in your office, other segments of the Service, the State or local licensing authorities, and public utilities, and interviews with the landlord, informers, and whole-

sale liquor dealers or any others having business dealing with the establishments, etc. In short, any inquiry short of an audit or other detailed examination of the financial books and records of the establishments and individuals as it is believed that such aspects can better and more properly be made by the Intelligence and Audit Divisions.

* * *

The investigation and prompt completion of this or any other work in connection with the Attorney General's drive against organized crime should be given special attention and priority over all other assigned duties even though it may adversely affect your regular enforcement operations. * * *

DWIGHT E. AVIS
Director, Alcohol and Tobacco
Tax Division"

The Alcohol Tax Division was supplied with leads to the Casa Bianca, the Hampshire House, and Gurney's Inn and presumably given access to the F.B.I.'s October 10, 1960 report on the defendant.

After a preliminary inquiry into the leads and a conference with Gerald Shur in Washington, the Alcohol Tax Division decided to broaden its investigation and place the defendant under constant surveillance. This surveillance began on May 17, 1961, and at times six to eight men were assigned to tail the defendant. It produced immediate results. The defendant was observed frequenting the Casa Bianca, driving a car registered in another person's name, enjoying a relatively high standard of

living, paying bills in cash, and most important, on July 17, 1961 and again on September 25, 1961, purchasing money orders at the Manufacturers Trust Co. bank. By October 27, 1961, a list of money orders that the defendant had purchased from Manufacturers Trust had been compiled.

Meanwhile, a routine search disclosed that the defendant had never filed an income tax return and, on June 1, 1961, Intelligence was asked to pursue this lead.

The defendant was also observed frequenting a health club located in a Brooklyn hotel. From August 21, 1961 to September 8, 1961, the Alcohol Tax Division engaged in electronic surveillance of this establishment. The defendant's voice was never picked up and no information was obtained pertaining to him.

(c) *Intelligence Division of Internal Revenue Service Investigation*

On February 27, 1961, H. Alan Long, Director of Intelligence, was requested to conduct an investigation of the defendant's gambling activities with regard to possible wagering tax violations. The case was assigned to Intelligence's Brooklyn office in early March.

At the outset, there was considerable uncertainty as to the type and scope of the investigation to be conducted. Set out below is an excerpt from a memorandum dated March 24, 1961 to the Assistant Regional Commissioner of Intelligence of the New York City Region from the Chief of Intelligence in Brooklyn:

> "Is it the desire of the National Office that we initiate wagering tax or income tax investigations, or

a combined investigation involving both areas of tax?

In view of the nature of the request (Department of Justice) shall we initiate a saturation type investigation including surveillance, etc., or should the investigations be restricted in time and manpower, pending more explicit instructions?"

One day earlier, Intelligence's Assistant Regional Commissioner had been notified by H. Alan Long that, at the present time, a saturation investigation was not contemplated. This information was immediately conveyed to the Brooklyn office, along with the instruction that "in view of * * * [the defendant's] alleged illegal activity in gambling it is presently assumed that * * * [an investigation] to determine if * * * he [has] violated the wagering tax provisions is more appropriate."

Both of these decisions concerning the nature of the investigation—that it be non-saturation and focus on the defendant's gambling activities—were soon to be changed. On July 17, 1961, the I.R.S. was requested by the Organized Crime Section to intensify its investigation of the defendant and to classify it as a saturation investigation:

"Honorable Mortimer M. Caplin
Commissioner
Internal Revenue Service
Washington 25, D. C.

Dear Mr. Caplin:

Based upon discussions with the Intelligence Agents assigned to the [case of] * * * Joseph

Appendix C

Frank Schipani and further based upon information supplied to us by other investigative agencies, it appears that the Internal Revenue investigation * * * will be productive.

It is therefore respectfully requested that the investigations of the above subjects be classified as saturation investigations.

Sincerely,

HERBERT J. MILLER, JR.
Assistant Attorney General"

There is no indication in the record as to what information was supplied by "other investigative agencies."

Meanwhile the Intelligence probe had already undergone a major change—its transformation from a gambling tax to an income tax investigation. The Schipani investigation had been transferred to Intelligence's Manhattan district office on April 28, 1961 and assigned to Special Agent Masetti. Masetti was "unfamiliar" with wagering tax cases; income tax fraud was his field. Consequently, although he was aware of the directive to proceed along other lines, he decided to conduct an income tax investigation. Masetti testified that this decision was made solely by him, without his consulting anyone.

Masetti proceeded to conduct a long, arduous and productive investigation into the defendant's financial affairs. Certain aspects of this inquiry have already been mentioned. No useful purpose would be served by further relating its details.

Appendix C

C. *Review by Department of Justice in 1966*

The fact that electronic surveillance had been employed in the Schipani investigation did not become known to attorneys in the Department of Justice until late October, 1966. The Supreme Court, without yet being aware of this information, denied certiorari on November 7, 1966, and the defendant was slated to begin serving his sentence shortly. An immediate review of the case was undertaken by Dewey O'Brien, then the Assistant Chief of the Criminal Section of the Tax Division. On November 18, 1966, O'Brien completed his review and sent a six-page memorandum containing his findings and conclusion to Mitchell Rogovin, Assistant Attorney General in charge of the Tax Division.

In his memorandum, O'Brien stated that he "would be reluctant to recommend outright dismissal of the indictment at this point without a more painstaking examination of the evidence" since many leads were available before the electronic surveillance began, but he could not "see how we can support the conviction." The basis for the latter conclusion was his findings that the electronic surveillance, which had been contemporaneous with the tax evasion investigation, had revealed likely sources of defendant's income and that there had been exchanges of information between the various agencies involved. As Mr. O'Brien ironically pointed out:

> "during the period in which the Schipani tax case was investigated the Government achieved the rare objective of complete interchange of information between three investigative agencies and the Department of Justice. Unfortunately, much of it was tainted."

Appendix C

O'Brien's opinion was based upon an examination of the F.B.I. reports on the defendant, the surveillance logs, the files of Intelligence, the Alcohol Tax Division and the Organized Crime Section, and the trial court's findings of fact and conclusions of law (but not the trial transcript). In addition, he had discussed the case with several of the Intelligence and Alcohol Tax Division agents involved. He did not speak to any of the F.B.I. agents and, thus, he may have been unaware of the limited cooperation provided by the F.B.I.'s New York office.

O'Brien did not write the supplemental brief which the Solicitor General submitted to the Supreme Court on November 30, 1966. He acknowledged that the position taken by the Solicitor General was somewhat at variance with his own, but he was at a loss to account for it. His then position was best summed up, he testified, by the Solicitor General's statement that "we cannot say in the instant case that none of the evidence used by the government at petitioner's trial was obtained, either directly or indirectly, from an improper source."

Asked by the Court to explain the Solicitor General's statement that "Some of the material in the F.B.I. reports (which were based in part on the electronic surveillance) provided investigatory leads and other information used in the proceeding against petitioner" and to identify the material and leads to which the Solicitor General referred, O'Brien stated:

> "I do not think I would have phrased it that way if I would have written it.
>
> I would have said, 'May have provided' because at that time we could not tell exactly what was done with the information.

Appendix C

> There was for example, an earlier report of the FBI before this—before the intercepted information—which had some of the same information as contained in one of the intercepts, and * * * the question would have been, whether or not the information in the tax case stemmed from the intercept or from that earlier report.
>
> I did not have the answer."

In addition, O'Brien pointed out that since he had not read the transcript of the defendant's trial, he could not say whether any specific item of evidence was tainted.

O'Brien assumed that the Solicitor General's brief had at least been partially based upon his memorandum. He did not know if the Solicitor General had additional information or had conducted an independent review. There is no indication in the record that such a review had taken place.

In order to assess the significance of this evidence, we turn now to the principles of law by which evidence must be evaluated on a motion to suppress. The key issues are those of burdens of proof.

II. Applicable Law

A. *Particular Items of Evidence*

1. *Is evidence to be excluded if it is obtained as a combined result of tainted and untained leads?*

[1] The test laid down in *Silverthorne* is that evidence is admitted if it is obtained from an untainted "independent source" but excluded if it is obtained as the re-

sult of illegality. Silverthorne Lumber Co. v. United States, 251 U. S. 385, 392, 40 S. Ct. 182, 64 L. Ed. 319 (1920). In the case before us a more appropriate simile than the "fruit of the poisonous tree" (Nardone v. United States, 308 U. S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939)), is, perhaps, that of a tree nourished by both pure and polluted waters. In this circuit the tendency has been to find any appreciable pollution sufficient to taint the fruit. See United States v. Paroutian, 299 F. 2d 486 (2d Cir. 1962).

[2] If the evidence is discovered as a result of both legal and illegal leads, it is inadmissible. It does not matter that the legal lead would itself probably have sufficed to uncover the evidence. As the Court of Appeals for this circuit declared, it is not sufficient for the government to show that "in the normal course of events it might have discovered the questioned evidence without an illegal search":

> "a showing that the government had sufficient independent information available so that in the normal course of events it might have discovered the questioned evidence without an illegal search cannot excuse the illegality or cure tainted matter. Such a rule would relax the protection of the right of privacy in the very cases in which, by the government's own admission, there is no reason for an unlawful search. The better the government's case against an individual, the freer it would be to invade his privacy. We cannot accept such a result. The test must be one of actualities, not possiblities." United States v. Paroutian, 299 F. 2d 486, 489 (2d Cir. 1962).

See also Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 Calif. L. Rev. 579, 624-30 (1968) ("The logic of the 'inevitable discovery' . . . collides with the fundamental purpose of the exclusionary rule"); Note, Fruit of the Poisonous Tree Doctrine—A plea for Relevant Criteria, 115 U. of Pa. L. Rev. 1136, 1143 (1967) (defendant need not show that police "would not have discovered the challenged evidence 'but for' the illegal police conduct").

2. *What is the burden of proof?*

(a) *Common Law Rule*

[3] Once it becomes apparent that the issue is in the case (Maguire, Evidence of Guilt, 221 (1959)), the government bears the burden of convincing the court that evidence it seeks to introduce at a criminal trial was not obtained by it in violation of a defendant's constitutional rights.

There is lack of agreement about the weight of this burden. Some have suggested that it is by a preponderance. Clifton v. United States, 125 U. S. App. D. C. 257, 371 F. 2d 354, 358-359 (1966), cert. denied, 386 U. S. 995, 87 S. Ct. 1312, 18 L. Ed. 341 (1967) (confession). Others use a varient of the phrase "clear and convincing evidence." United States v. Smith, 308 F. 2d 657, 663 (2d Cir. 1962), cert. denied, 372 U. S. 906, 83 S. Ct. 717, 9 L. Ed. 716 (1963) (consent to search must be "proven by clear and positive evidence"); Fisher v. United States, 382 F. 2d 31, 34 (5th Cir. 1967) (confession; "clear cut determination"); Evans v. United States, 375 F. 2d 355, 360 (8th Cir. 1967), rev'd on other grounds sub nom. Bruton v. United States, 391 U. S. 123, 88 S. Ct. 1620,

20 L. Ed. 2d 476 (1968) (confession); United States v. Page, 302 F. 2d 81, 83-84 (9th Cir. 1962) (consent to search; "clear and positive testimony"); cf. United States v. Wade, 399 U. S. 218, 240, 87 S. Ct. 1926, 1939, 18 L. Ed 2d 1149 (1967) (government could "establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect" other than those made at the prior identification; reasons for standard not discussed). Still others have declared that "proof beyond a reasonable doubt" is required. Mullins v. United States, 382 F. 2d 258, 261 (4th Cir. 1967) (confession); United States v. Inman, 352 F. 2d 954, 956 (4th Cir. 1965) (confession); Clifton v. United States, 125 U. S. App. D. C. 257, 371 F. 2d 354, 360-364 (1966), cert. denied, 386 U. S. 995, 87 S. Ct. 1312, 18 L. Ed. 2d 341 (1967) (concurring opinion) (confession); Pea v. United States, 397 F. 2d 627, 633, n. 7 (D. C. Cir. 1968), (collecting cases in other jurisdictions; confession); United States v. Taglianetti, 274 F. Supp. 220, 226 (D. R. I. 1967) (electronic surveillance). Cf. Gillison v. United States, 399 F. 2d 586, 588 (D. C. Cir. July 2, 1968) (state must show that line of questioning was harmless beyond reasonable doubt); United States v. Feinberg, 383 F. 2d 60, 70, n. 10 (2d Cir. 1967), cert. denied, 389 U. S. 1044, 88 S. Ct. 788, 19 L. Ed. 2d 836 (1968) (citing New York standard of beyond a reasonable doubt in confession cases); People v. Johnson, 68 Cal. Rptr. 599, 609, 441 P. 2d 111, 121 (May 28, 1968) (state must show beyond reasonable doubt that erroneous admission of prior inconsistent statement constituted harmless error). Mathes and Devitt, Federal July Practice and Instructions, § 8.16 (1965) (jury to be instructed not to use confession unless satisfied beyond a reasonable doubt that it was voluntary). Finally, there are opinions eschewing the opportunity to fix a standard.

See, e. g., Jackson v. Denno, 378 U. S. 368, 405, 84 S. St. 1774, 12 L. Ed. 2d 908 (1964) (dissent) (question of weight of burden in confession cases left open); Pea v. United States, 397 F. 2d 627, 639 (D. C. 1968) (dissent) (Supreme Court's refusal "to come to grips with problem"; others "have avoided the problem"); cf. United States v. Jordan, 399 F. 2d 610, 614 (2d Cir. July 30, 1968) ("government had a heavy burden of proving voluntary consent" to search); Carlo v. United States, 286 F. 2d 841, 848 (2d Cir.), cert. denied, 366 U. S. 944, 81 S. Ct. 1672, 6 L. Ed. 2d 855 (1961) (search and seizure; "quantum of proof * * * not that required on a trial of the issue of guilt or innocence").

In the case before us, the precise weight of the government's burden may affect the decision on the motion to suppress. We are, therefore, compelled to address the question with some attention. The matter presents inherent practical and theoretical difficulties.

The problem will, perhaps, be more clearly exposed by considering a number of simple hypothetical situations. (The terminology used generally follows Michael and Adler, The Trial of an Issue of Fact, 34 Colum. L. Rev. 1224, 1252 (1934) and Michael and Adler, The Nature of Judicial Proof (1931). See also, e.g., Ball, The Moment of Truth: Probability Theory and Standards of Proof, 14 Vand. L. Rev. 807 (1961); James, Relevancy, Probability and the Law, 29 Calif. L. Rev. 689 (1941)).

[4] In a civil case involving a breach of contract where defendant claims that he did not execute the agreement, the court will admit the alleged written contract if a reasonable man might find that it was signed by or on behalf of the defendant. Admissibility depends purely

on the document's meeting minimum standards of probative force. There may be mixed questions of law and fact relating to "execution" turning on whether, for example, the document was forged or whether the defendant was tricked into signing it. In determining whether the material proposition—the defendant "entered" into the contract—has been established, the jury will consider all of the admitted evidence, including the document before it. If there is some doubt about whether the defendant's signature was forged, or whether he had authorized an agent to execute it, the jury will consider this doubt in evaluating all the lines of proof bearing on the material proposition.

The level of burden of proof (persuasion) with respect to the material proposition will be, since this is an ordinary civil case, a preponderance—that is to say the trier must be convinced, on the basis of his evaluation of the evidence, that the proposition is more probably true than false (50+% probable for purposes of this analysis). Thus, if the trier would have been just convinced that the material proposition was probably true absent this doubt about the authenticity of the document, doubt about this line of proof might sufficiently reduce his evaluation of the probability of the material proposition so that he might find that it was not proven (50% or less probable).

The jury's evaluation of the evidence relevant to a material proposition requires a gestalt or synthesis which seldom needs to be analyzed precisely. Any item of evidence must be interpreted in the context of all the evidence intruduced (and often of that reasonably expected which was not produced). In giving appropriate, if sometimes unreflective, weight to a specific piece of evidence the trier will fit it into a shifting mosaic. If the trier

concludes that one item of evidence is reliable, this may affect his evaluation of the credibility of a witness who gives testimony inconsistent with this evidence. His evaluation of the credibility of this witness may, in turn, affect his conclusion as to the probative force of the witness' testimony with respect to another line of proof. But confirming evidence of that other line of proof may require a reevaluation of the witness' credibility and a complex readjustment of the assessment of all the interlocking evidence.

[5] Since so much of the evaluation of evidence depends upon varying hypotheses applied by triers with different backgrounds and views of life, fact finding differences among jurors and between judge and jury are to be expected. The court's function is, in the usual simple case, only to decide whether a reasonable man might have his assessment of the probabilities of a material proposition changed by the piece of evidence sought to be admitted. If it may affect that evaluation it is relevant and, subject to certain other rules, admissible. Even, therefore, if a juror decides that the probability is only 40% that the document referred to above is authentic, it may help him determine whether the material proposition is more probably true than not. This difference between the probabilities required of a material proposition and of relevant evidence and individual lines of proof partly explains why, in criminal cases, some courts have said that while the burden of proof of an element of the crime is beyond a reasonable doubt, individual items of evidence need not be proved by so high a standard. United States v. Valenti, 143 F. 2d 362, 364 (2d Cir. 1943); People v. Klinkenberg, 90 Cal. App. 2d

608, 204 P. 2d 47, 62 (1948); 9 Wigmore, Evidence, § 2497, p. 324 (3d ed. 1940).

It is apparent, then, that the judge's function in determining admissibility in a case such as is hypothesized above is relatively simple. 9 Wigmore, Evidence § 2550 (2d ed. 1940); Maguire and Epstein, Preliminary Questions of Fact in Determining the Admissibility of Evidence, 40 Harv. L. Rev. 392 (1927); Morgan, Same Problems of Proof Under the Anglo-American System of Litigation 86-105 (1956); Note, 59 Harv. L. Rev. 488-491 (1964); California Law Revision Commission, Recommendation Proposing an Evidence Code, 56-70 (1965). He need not be concerned unduly about mistakenly admitting evidence because, if the document lacks probative force, the jury can (absent factors such as prejudice) be counted on to ignore it. Only time has been lost by admitting evidence with probative force as low that is cannot affect the outcome.

Where admissibility of evidence depends upon extrinsic policies rather than upon probative force, the problem is more complex and the pressure on the trial judge is greater. Let us suppose, solely for the sake of analysis, that the burden on the government is to prove by a preponderance that a proferred document with high probative force was not obtained in violation of the law. Assume that exclusion depends upon an extrinsic policy designed to protect constitutional rights and to discourage obtaining evidence illegally. Suppose that the only material proposition in the case is whether defendant had certain knowledge (as that the powder he possessed was a narcotic). Let us suppose that the only evidence on the point is a letter from the defendant and that it would permit a jury to find beyond a reasonable doubt (95+%

probable, for the purpose of this analysis) that he did have knowledge.

Now, if we suppose that the judge has decided that there is a question about whether the document was illegally obtained but that there is a bare preponderance (50+% probable) in favor of the government's contention that it was legally obtained, the judge will, on the assumptions made, admit it. The question of whether the document was or was not illegally obtained is not considered by the jury and normally it will not have before it evidence bearing on this question. Thus, the jury will give the document its full probative weight and it will find the defendant guilty beyond a reasonable doubt.

Whether such a result in a criminal case is proper depends upon how the rule of law is stated. If it is: "the material proposition of knowledge must be proven beyond a reasonable doubt *by evidence properly admitted in the trial*" the verdict should stand. If it is: "the material proposition of knowledge must be proven beyond a reasonable doubt *by legally obtained evidence,*" there is doubt about the validity of the conviction. A judge who tried the case without a jury might well have to come to a different conclusion applying the second test. Assuming that the analyzed the evidence in the way a jury would, he might have concluded that the probability of knowledge was 95+% if he assessed the document solely on the basis of its probative force. But if he discounted that probative force by the probabilities relating to the illegality, then the total probative force of all the relevant evidence might well have fallen below 95+%. The documentary line of proof would not then have a force of 95+% probability but of (95+ x 50+)%, or somewhere in the order of 50+%.

Appendix C

This attenuation of probabilities results from the fact that, where variables are independent and the probability of a combination of variables is to be determined, the probability of each variable is multiplied by the probabiilty of one of two variables aproaches 100% the tary Statistics, 56-63 (1966); Keynea, A Treatise on Probability, 121, 135-136 (1952). Probative force and illegality are sufficiently independent to justify multiplying them for the purposes of this analysis. Where the probabiilty of one of two variables approaches 100% the product will, of course, approximate the probability of the less probable variable.

[6] Dicta of the Supreme Court, while not decisive, suggest that the rule of law is that a defendant must be proved guilty beyond a reasonable doubt by legally obtained evidence. See, e. g., Lynumn v. State of Illinois, 372 U. S. 528, 537, 83 S. Ct. 917, 9 L. Ed. 2d 922 (1963); Payne v. State of Arkansas, 356 U. S. 560, 568, 78 S. Ct. 844, 2 L. Ed. 2d 975 (1958). For example, in Payne v. State of Arkansas, 356 U. S. 560, 568, 78 S. Ct. 844, 850, 2 L. Ed. 2d 975 (1958), The Court noted that it:

> "has uniformity held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence * * * of the coerced confession vitiates the judgment * * *."

Cf. Fahy v. State of Connecticut, 375 U. S. 85, 86-87, 84 S. Ct. 229, 11 L. Ed. 2d 171 (1963) (search and seizure; "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction"). Since even the slightest possibility that ille-

gally obtained evidence was used vitiates a confession, a very effective procedural screen must be interposed.

Most of the cases dealing with burdens of proof on admissibility have been confession cases and the issue has been unconstitutional "coercion." But it is hard to see why the issue of whether the police "coerced" a confession in violation of the constitution should be treated, for procedural purposes, any differently from that of whether they obtained evidence "as a result of" illegal electronic surveillance. Both words—"coercion" and "result"—have factual and legal content and a finding with respect to the fact component in each presents similar problems to the judge.

Any evidence which is illegally obtained may be damning, so that the decision cannot turn on the importance of a confession in a case. Frequently, having lost on a motion to suppress, the defendant's chance of avoiding conviction is hopeless. A "confession" may contain exculpatory material, be incomplete, or be unreliable so that it is no more the equivalent of a plea of guilty than is key evidence illegally obtained. Certainly the burden of proof at a preliminary hearing should not depend upon how critical the evidence sought to be suppressed may be at the trial. The judge is often unable to accurately predict at that stage whether particular evidence will clinch the prosecution's case.

The fact that exclusion in "coercion" cases was historically based upon lack of probative force (Maguire, Evidence of Guilt, 108-109 (1959)) while exclusion of other kinds of illegal evidence has been based upon purely extrinsic policies (People v. Cahan, 33 Cal. 2d 434, 439, 442, 445-449, 282 P. 2d 905, 907, 909-914 (1955); Maguire,

Evidence of Guilt, 167-169 (1959)), does not justify a higher burden in a confesison case. In fact, as we have already seen, the probative force argument may be available to the jury where a confession is introduced, while it may not be if evidence obtained by illegal searches or surveillance is used. Cf., as analogous to confession cases, United State v. Davis, —— F. 2d ——, ——, n. 1 (2d Cir. July 17, 1968), (voir dire on identification procedures followed by evidence before jury on reliability of identification in court). There is, therefore, some possibility that the jury will discount a confession which is in fact not voluntary but almost none that it will ignore evidence obtained by illegal electronic surveillance, wiretaps or searches. More, rather than less, protection therefore seems called for in cases such as the one before us.

It is extrinsic policy considerations rather than lack of probative force that now explain many confession exclusion rulings. See, e.g., Spano v. People of the State of New York, 360 U. S. 315, 320-321, 79 S. Ct. 1202, 3 L. Ed. 2d 1265 (1959); Jackson v. Denno, 378 U. S. 368, 386, n. 13, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). The policies are essentially the same in search and seizure, wiretapping and electronics eavesdropping cases. See, e. g., American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Electronic Surveillance, 114-115 (1968). In each instance an important constitutional right of the defendant is being protected and the policy of deterring future lawlessness by officials is being applied. "The dignity of the United States Government will not permit the conviction of any person on tainted testimony," Mesarosh v. United States, 352 U. S. 1, 9, 77 S. Ct. 1, 5, 1 L. Ed. 2d 1 (1956).

[7] Confessions obtained as a result of violations of constitutional search and seizure requirements are, for that reason alone, inadmissible; "it matters not," Judge Fuld has properly instructed us, "that these 'fruits' happen to be confessions rather than some other type of evidence." People v. Rodriguez, 11 N. Y. 2d 279, 286, 229 N. Y. S. 2d 353, 357, 183 N. E. 2d 651, 654 (1962). It would make little sense if, as a result of a doubt about a single illegal search, the confession alleged to have been obtained were excluded and the seized real proof were admitted because the burdens were different. Simplicity and ease in administration suggests the desirability of a single high standard in all suppression hearings. There is "no reasonable or logical basis for any distinction between inanimate (tangible) and animate (testimonial) evidence." People v. Dentine, 21 N. Y. 2d 700, 703, 287 N. Y. S. 2d 427, 429, 234 N. E. 2d 462, 463 (1967) (Fuld, C. J. dissenting).

[8] A workable rule giving adequate consideration to the importance of the exclusionary policy is to require the government to prove beyond a reasonable doubt that the evidence it introduces was legally obtained. This is a familiar standard in criminal cases. It is the one already utilized in some jurisdictions and adopted by the most recent appellate decisions on the subject. See Pea v. United States, 397 F. 2d 627 (D. C. Cir. 1968) and see cases cited at pp. 54, 55, supra.

Application of this standard, based on observations in this Court, would not affect the government adversely in any significant number of cases. Most of the problems with respect to illegally obtained evidence in the federal courts are of an interim nature arising in large part from

a lack of clear guidelines available to federal law enforcement personnel rather than to undisciplined lawlessness. As the legal standards become clearer and the procedures for insuring compliance more routinized, motions to suppress because of illegally obtained evidence will become less important than they are today. As a practical matter, even today at hearings on motions to suppress, there is often no serious dispute about the facts (see, e. g., United States v. Feinberg, 383 F. 2d 60, 70 (2d Cir. 1967), cert. denied, 389 U. S. 1044, 88 S. Ct. 788, 19 L. Ed. 2d 836 (1968))—what Justice Frankfurter has referred to as "the crude historical facts, the external 'phenonumenological' occurrences and events." Culombe v. Connecticut, 367 U. S. 568, 603, 81 S. Ct. 1860, 1879, 6 L. Ed. 2d 1037 (1961). Where there remains a reasonable doubt about what happened and whether the government acted lawfully, the evidence should be excluded.

We need not now decide whether this rule ought to apply to factual issues such as consent in search and seizure cases. Cf. United States v. Dawson, —— F. 2d ——, —— (2d Cir. August 12, 1968). The government's conduct has concededly been illegal, the information and evidence bearing on the factual questions now before us are peculiarly within its ken, and an important federal policy of protecting citizens against this sort of intrusion on their privacy is at stake. It is fitting that the government bear the burden of proof and that it be a high one. See Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 Calif. L. Rev. 579, 647-48 (1968).

This decision with respect to burdens of proof in suppression cases is consistent with "the high standards which past decisions have insisted be maintained in the

conduct of *federal criminal trials.*" Lawn v. United States, 355 U. S. 339, 365, 78 S. Ct. 311, 326, 2 L. Ed. 2d 321 (1958) (concurring opinion) (emphasis supplied). Mesarosh v. United States, 352 U. S. 1, 3, 77 S. Ct. 1, 2, 1 L. Ed. 2d 1 (1956) ("the decision herein passes only on the integrity of the criminal trial in the federal courts"). Whether the Constitution requires that the same rule be applied by the states is not a matter we need now consider. Cf. Chapman v. State of California, 386 U. S. 18, 43, n. 2, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

(b) *Statutory Rule*

[9, 10] This analysis of the common law is consistent with the Omnibus Crime Control and Safe Streets Act of 1968. Except for the specific overruling of the *McNabb-Mallory* rule by subdivision (c) of section 3501 of title 18 of the United States Code (P.L. 90-351, § 701(c)), the language of the Act is directed to the reliability components of the confession-exclusion rules, not to the extrinsic policy components. Senate Report No. 1097, 1968 U. S. Code Cong. & Admin. News, 1634, 1646-1649.

While Congress was also concerned with the *Escobedo-Miranda* rules (id. at 1650-1660), the Act itself contains no detailed provisions such as subdivision (c) dealing with these and other constitutional exclusionary rules. Cf. the detailed proposals for dealing with *Escobedo-Miranda* in American Law Institute, A Model Code of Pre-Arraignment Procedure, Tentative Draft No. 1 (1966); ibid, Study Draft No. 1 (1968); Schaefer, The Suspect and Society, 39-56 (1966).

[11] Such circumstances referred to in subdivision (b) of section 3501 of title 18 as the time between arrest and

arraignment, whether the declarant knew the nature of the charge against him, whether he knew of his rights and whether he had the assistance of counsel, may affect the "voluntary" nature of a confession and thus its reliability. Inclusion of these factors in the statute does not foreclose their being considered by the court on separable constitutional issues.

A charge requiring that the jury be satisfied by proof beyond a reasonable doubt of its voluntary nature is apparently not required under the Act. Once the court has passed upon admissibility, if the confession is admitted, it may be given its natural probative force by the jury.

[12] The Act does not address itself to the burden required to be satisfied at the hearing before the judge on the issue of admissibility. Accordingly, that burden remains what it is now, proof beyond a reasonable doubt if exclusion is required because of a violation of defendant's vital constitutional or statutory rights. (We need not now decide what the burden of proof is on the voir dire where "involuntariness" was not due to official misconduct and only the question of reliability is raised.)

[13]) The electronic surveillance by the F.B.I. did not comply with the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. P.L. 90-351, § 801 et seq., 18 U.S.C. § 2510 et seq. Divulgence at a trial or to other government agents would, accordingly, be prohibited by the Act even if it has retroactive effect. P.L. 90-351, § 802, 18 U.S.C. § 2517.

In short, the Omnibus Crime Control and Safe Streets Act of 1968 has not affected the common law rules applicable to this case.

Appendix C

3. *Has the government met its burden?*

The government has established by a preponderance of evidence and possibly by clear and convincing proof—though not beyond doubt—that the information obtained by the F.B.I. from the electronic surveillance was not furnished to Intelligence. While the New York office of the F.B.I. did ignore, in part, Attorney General Robert F. Kennedy's insistence on cooperation between all federal law enforcement agencies in the drive against organized crime, there may well have been compliance with the Attorney General's directive at the highest levels of the F.B.I. in Washington. There is at least a reasonable doubt about whether the F.B.I. reports, which included data obtained through electronic means, were regularly provided to the Organized Crime Division. The Organized Crime Division, in turn, then may have passed this information on to Intelligence through top-level consultations. In this manner, the tainted information might have filtered up from the New York office of the F.B.I. to the Justice Department and then back down to the Intelligence agents in New York.

The only information picked up by the electronic microphones concealed in the Prisco Travel Bureal relevant to defendant's income tax prosecution concerned possible sources of defendant's income—his involvement in labor union activities and the carting business and his partial ownership of the Casa Bianca Restaurant. The court, at defendant's first trial found that "Likely sources for defendant's income during the indictment years are an interest in a restaurant business [Casa Bianca] and services as a go-between in labor relations of employers with unions." United States v. Schipani, 63-CR-237, E. D. N. Y., October 15, 1965, p. 7.

Appendix C

Two conversations in which the Casa Bianca Restaurant was mentioned were monitored. One was between Clemente and an underworld associate on January 19, 1961 in which it was indicated that Schipani had partial control of the restaurant. The other took place on September 12, 1961 between Clemente and the defendant in which Clemente stated that they should have bought out the Casa Bianca and run it themselves.

This information confirmed what the F.B.I. had strongly suspected back in 1958, namely, that the defendant had an undisclosed interest in this restaurant. In addition, shortly after the Schipani investigation began, the Alcohol Tax Division surveillance indicated that this would be a fruitful line of inquiry. The monitored conversations probably did not furnish the government with any leads with which to pursue this line of proof. All the numerous bits of testimony and evidence relating to the Casa Bianca introduced at the defendant's trial were obtained through legitimate investigatory techniques.

[14] Nevertheless, the Court finds that the government has not established beyond a reasonable doubt that the evidence of the defendant's involvement with the Casa Bianca had an independent origin. The information concerning the Casa Bianca obtained through the electronic surveillance would have presumably been furnished to Intelligence shortly after its investigation began at a time when it had to decide which avenues of inquiry were worthy of the limited investigative resources available. This illegally obtained data may have freshened up the government's legitimate leads and caused it to concentrate more intensively on them.

Nor has the government established beyond a reasonable doubt that the electronic surveillance did not supply leads for its investigation into the defendant's labor and carting activities in addition to the leads it had lawfully acquired. There were repeated and clear references to these activities in the surveillance logs. Much of the information in the logs could not have been obtained through normal investigative techniques.

The tainted evidence related to specific sources of income—a restaurant, the cartage industry, and labor union activities. Evidence of such sources of income will be suppressed.

Other evidence of defendant's net worth was proved beyond a reasonable doubt to be untainted. It may be used by the government provided the entire prosecution has not been fatally compromised, an issue to which we now turn.

B. Entire Investigation

Defendant seeks to suppress all the government's evidence on the ground that the entire case has been fatally blemished by virtue of the fact that the July 17 order to conduct a saturation investigation of the defendant was a result of the electronic eavesdropping. This contention with respect to the government's decision to focus on defendant's activities raises difficult legal and factual issues concerning the scope of the so-called "fruit of the poisonous tree" doctrine and its application to this case.

1. *Can a tainted decision to focus abort an entire prosecution?*

[15] The legal question presented is whether an entire prosecution can be vitiated if the government ob-

tains information illegally and on the basis of that information decided to throw its weight against an individual, even though the officials in charge of the investigation are unaware of the illicit source of the data and proceed in a lawful manner. Not all evidence, the Supreme Court has recently told us in *Wong Sun,* "is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." Wong Sun v. United States, 371 U. S. 471, 488, 83 S. Ct. 407, 417, 9 L. Ed. 2d 441 (1963). Rather, the test is "whether, granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Ibid.

[16] If illegally secured information leads the government to substantially intensify an investigation, all evidence subsequently uncovered has automatically "been come at by exploitation of that illegality." Ibid. The unlawful search has set in motion the chain of events leading to the government's evidence. There has then been "a continuing * * * [and] significant participation by prosecution officials" in the illegality from the time of the police misconduct to the time of the discovery of the evidence. Ruffin, Out On A Limb Of The Poisonous Tree: The Tainted Witness, 15 U. C. L. A. L. Rev. 32, 38 (1967). "The road from the tap to the testimony may be long, but it is straight." United States v. Tane, 329 F. 2d 848, 853 (2d Cir. 1964). See also Maguire, Evidence of Guilt 246 (1959) ("exclusion of evidence about secondary discoveries made possible solely or facilitated by the original violation"); Pitler, "The Fruit of the

Poisonous Tree" Revisited and Shepardized, 56 Calif. L. Rev. 579, 642-46 (1968).

[17] In the present case, if, as a result of the electronic eavesdropping, the government overheard Schipani say "I robbed the 'X' bank" and then sought to prosecute him for that bank robbery after an investigation touched off by this remark, it is doubtful if the government could successfully withstand a motion to dismiss the indictment. See Smith v. United States, 120 U. S. App. D. C. 31, 344 F. 2d 545 (1965) (discovery that crime had been committed as a result of illegal search); United States v. Tane, 329 F. 2d 848 (2d Cir. 1964) (government first learns from wiretapped conversation that defendant was receiving unlawful payments); United States v. Coplon, 185 F. 2d 629 (2d Cir. 1950) (if police "had been set on the [defendant's] trail" by wiretapping, entire prosecution vitiated); People v. Dentine, 21 N. Y. 2d 700, 287 N. Y. S. 2d 427, 428-430, 234 N. E. 2d 462 (1967) (Fuld, J., dissenting); cf. United States v. Hagarty, 388 F. 2d 713 (7th Cir. 1968) (electronic surveillance). See also Broeder, Wong Sun—A Study in Faith and Hope, 42 Neb. L. Rev. 483, 523 (1962). Similarly, if the government sought to rely upon the testimony of a witness whose identity was revealed by an unlawful source, it would not be permitted to do so. See, e. g., People v. Martin, 382 Ill. 192, 46 N. E. 2d 997 (1942).

[18] The result should not be different if the government learns through illegal means that a person is closely connected with organized crime and then proceeds to launch an income tax investigation. Discovery of such information has much the same effect as overhearing the

defendant say "I haven't paid taxes for the last five years." The fact that a general exploratory investigation of the defendant is already in progress at the time does not license investigators to use illegal leads. Cf. Williams v. United States, 382 P. 2d 48 (5th Cir. 1967); People v. Dentine, 21 N. Y. 2d 700, 287 N. Y. 2d 427, 430, 234 N. E. 2d 462 (1967) (Fuld, J., dissenting); People v. Mills, 148 Cal. 2d 392, 306 P. 2d 1005, cert. denied, 355 U. S. 841, 78 S. Ct. 55, 2 L. Ed. 2d 46 (1957).

The unique circumstances of an income tax investigation make a decision to focus intensively of critical importance. As opposed to crimes like assault or robbery, tax evasion is hidden. There are at least hundreds of thousands of tax violators whose criminality has not been revealed. One of the chief problems for the government is to decide how it is going to utilize its limited tax investigation forces. The main hope of a tax violator is that the Internal Revenue Service will remain unaware of his existence. Once the government begins to concentrate all its enormous resources on a citizen, the chance of its discovering that he has violated the tax laws is greatly multiplied. It is difficult to perceive how the government could receive any more valuable information than the name of a probable tax violator.

We recognize that this approach to the focusing decision may be viewed as contrary to that reached by Judge Learned Hand in the 1942 case of United States v. Nardone, 127 F. 2d 521 (2d Cir.), cert. denied, 316 U. S. 698, 62 S. Ct. 1296, 86 L. Ed. 1767 (1942). In that case, Judge Hand declined to apply the "fruit of the poisonous tree" doctrine where the information obtained by wiretapping admittedly "spurred the authorities to press an investigation which they might otherwise have

dropped." 127 F. 2d at 523. He declared that "the Supreme Court [had not] meant to involve the prosecution of crime in such a tenebrous and uncertain inquiry, or make such a fetich of the statute as so extreme an application of it would demand." Ibid.

The *Nardone* case is distinguishable for two reasons. First, the unique circumstances surrounding an income tax prosecution, noted above, serve to distinguish *Nardone*—an alcohol smuggling prosecution—from the instant case.

Second, it has been undermined by recent decisions of the Supreme Court and lower federal courts. The test announced in *Wong Sun*, which focuses on police exploitation of the illegality, significantly expands the area which can be tainted by an unlawful search and seizure. See, e.g., Smith v. United States, 120 U. S. App. D. C. 160, 344 F. 2d 545 (1965); United States v. Tane, 329 F. 2d 848 (2d Cir. 1964); cf. Harrison v. United States, 392 U. S. 219, 224, 88 S. Ct. 2008, 2011, 20 L. Ed. 2d 1047 (1968) (question whether "petitioner's trial testimony was * * * impelled by * * * wrongful use of his illegally obtained confessions"). The courts have within recent years felt it their duty to engage in what Judge Hand would have described as "tenebrous and uncertain inquiry" where constitutional rights are involved. See Harrison v. United States, 392 U. S. 219, 88 S. Ct. 2008, 20 L. Ed. 2d 1047 (1968); Smith v. United States, 120 U. S. App. D. C. 160, 344 F. 2d 545 (1965) ("by contacting Donaldson, the police created the pressure which impelled Hardy to turn the transmission over to the police").

In Harrison v. United States, for example, the prosecution introduced petitioner's testimony at a prior trial

in which he had denied committing the offense in question, but admitted being at the scene; this testimony had been given after petitioner's confession—later ruled to be inadmissible—had been introduced. The Supreme Court reversed on the ground that the government had not demonstrated "that the petitioner's testimony was obtained 'by means sufficiently distinguishable' from the underlying legality 'to be purged of the primary taint'". 392 U. S. at 226, 88 S. Ct. at 2012. The question, the court declared,

> "is not *whether* the petitioner made a knowing decision to testify, but *why*. If he did so in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted." 88 S. Ct. at 2010 (emphasis in original).

The Supreme Court felt it necessary to inquire into the motives of a defendant to testify at his trial. Federal courts cannot avoid an inquiry to determine whether the intensity of the government's investigation of a possible tax violator was substantially affected by illegally elicited information.

2. *What is the government's burden of proof on the focusing issue?*

[19] The exacting standard of beyond a reasonable doubt is not appropriate to the issue of whether the intensity of the government's total investigation was substantially affected by illegal electronic surveillance. Rather, we think, a preponderance of the evidence test is called for.

First, we are not dealing with an item of evidence that will ultimately be introduced at a trial and relied upon by the jury. Thus, the consideration that the defendant

be convicted beyond a reasonable doubt on legally obtained evidence is not as important as it is when individual items of evidence are considered.

[20] Second, the courts should avoid wherever possible making detailed inquiries into the reasons for executive decisions and examining communications among high officials which are the basis of their exercise of judgment. Cf. 8 Wigmore, § 2378(3) (McNaughton rev. 1961); Gellhorn and Byse, Administrative Law Cases and Comments, 617-618 (4th ed. 1960). Not only is this reluctance supported by proper respect for the separation of powers, but by the practical consideration that it is often impossible for a highly placed official to analyze or remember the varied emotional and intellectual reasons for a decision. A decision to intensify an investigation is one of executive judgment and it would be unrealistic to require the government to meet a higher burden of proof than a preponderance.

3. *Has the government met its burden?*

[21] The government has established by a preponderance of evidence and possibly by clear and convincing proof—though not beyond a reasonable doubt—that the intensity of its investigation by Intelligence and the Alcohol Tax Division was not affected by tainted information.

It is highly likely that the government would have launched a saturation investigation of the defendant even if no information had been received from electronic surveillance of the Prisco Travel Bureau. The untainted F.B.I. report of October 10, 1960 identified the defendant as a powerful underworld figure, associated with

many of New York's top mobsters. He was reputed to have "inherited" the gambling interests of Joe Adonis and to have undisclosed interests in three restaurants.

The investigation touched off by Attorney General Robert F. Kennedy's organized crime drive soon brought additional leads to light through acceptable investigative techniques. Defendant had never filed an income tax return although he obviously enjoyed a high standard of living. Immediately after the investigation began, the defendant appeared so vulnerable and the likelihood that an income tax investigation would prove fruitful was so great, that government agents would naturally focus on him.

This strong scent of big game probably explains why Intelligence Special Agent Masetti's unilateral decision to switch to an income tax investigation was acquiesced in by his superiors in Washington. Masetti's expertise in income tax fraud is a natural and reasonable explanation of his own decision. While there does remain a reasonable doubt about the motives for the switch from a limited series of investigations on narrow grounds—wagering tax and alcohol tax forms—to a broad scale income tax investigation, the government has proved by a preponderance that this decision was not based on illegally obtained evidence. The government's burden on this issue has been satisfied.

The Alcohol Tax Division's surveillance, which also resulted from the January, 1961 decision to begin a preliminary investigation, revealed that the defendant was driving a car registered in another person's name, paying bills in cash, and, of crucial importance, purchasing large quantities of money orders. This latter lead was first discovered on July 17, 1961—the same date on which Intelligence was requested to begin a saturation investiga-

tion. These initial lawfully made discoveries fed on each other. As more leads were uncovered, the intensity of the investigation steadily escalated, leading to the uncovering of still more evidence.

The information elicited through electronic surveillance did not significantly contribute to the progress of the investigation or encourage the investigators. Most of the information obtained from this source was already known. Only one F.B.I. report on Schipani was filed between the time the electronic surveillance began and the time the decision was made to launch a saturation investigation. This report, dated June 15, 1961, revealed the defendant's close association with Clemente, his plans to open a carting business, and his involvement in the sale of Puerto Rican sweepstake tickets on the New York docks. In addition, the suspicion that Schipani had a partial interest in the Casa Bianca was confirmed. Although the specific information concerning Schipani's plan to form a carting company was new, his position as a major figure in the Brooklyn carting industry had been known for some time. Possibly, it is this information, plus that furnished by the Alcohol Tax Division, to which the July 17 saturation order refers when mention is made of "information supplied * * * by other investigative agencies." It cannot be said that these comparatively minor leads—as opposed to those uncovered through legitimate investigatory techniques by Intelligence and the Alcohol Tax Division—were responsible for the increase in the intensity of the Schipani investigation.

CONCLUSION

All evidence relating to the defendant's likely sources of income which was introduced at the first trial is suppressed. The motion is denied in all other respects.

So ordered.

APPENDIX D

Memorandum and Order of the United States District Court (October 14, 1968, Weinstein, D. J.)

(Not Reported)

Appearances:

Joseph P. Hoey, Esq.,
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Eldon F. Hawley, Esq.,
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Trial Attorneys, Department of Justice
Tax Division
Of Counsel

Jacob P. Lefkowitz, Esq.
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Attorney for Defendant

WEINSTEIN, D.J.

Defendant has made a number of related motions with respect to the record in this and the prior trial. They are decided as follows (the numbers set out below conform to those in defendant's brief dated September 30, 1968):

I (1). The motion to exclude the 1943 "Admission Summary" is denied. The admission of the defendant with respect to his assets is relevant.

Appendix D

I (2). The motion to strike the testimony with respect to statements made by Schipani to Agent Maher is not granted. This evidence is not relied upon by the Court at this trial. As in the case of Agent Shedd's testimony referred to below, this testimony is so vague, ambiguous and lacking in probative force with respect to the specific years in question, that it is insufficient to show a source of income. It is not relied upon at all by the Court, so that defendant's motion to strike need not be considered.

I (3). The motion to strike the testimony of Special Agent Wynne used to impeach the testimony of the witness Corwin is granted.

I (4). The motion to strike all the government's net worth formulations is denied.

I (5). The motion with respect to "3500" materials is denied. This issue is no longer alive.

II. The defendant's motion to strike all reference to defendant's alleged background of illicit activity is granted. The Court will not base its decision on defendant's criminal background, if any.

III. The motion based on defendant's contentions with respect to electronic monitoring affecting the defendant has been adequately dealt with in this Court's prior opinion. Treating the present motion as one for reargument in connection with the suppression hearing, the motion is denied.

Electronic eavesdropping involving one Tony Ricci has no bearing in the instant case. At the Court's request,

the logs relating to that surveillance were examined by the government. The government has represented that the defendant's name was not mentioned, none of his activities were mentioned, and the defendant's voice was not picked up. Based upon the suppression hearing already had in this case, it is clear that no leads to evidence used against the defendant were obtained as a result of electronic eavesdropping involving Tony Ricci.

IV (1). The motion to suppress proof relating to Schipani's alleged income from gambling is granted.

IV (2). The motion to suppress the testimony of Agent Shedd with respect to defendant's alleged admissions of gambling activities need not be ruled upon for the same reason that the motion with respect to Agent Maher's testimony (I (2)) was not considered.

V. Defendant's motions addressed to the competence and materiality of the government's basic proof in support of the net worth theory are denied. The Court will deal with the question of whether the government has satisfied its burden of proof in a separate memorandum following receipt of the defendant's brief analyzing the evidence in the case.

Dated: Brooklyn, New York
October 14, 1968

.....

U.S.D.J.

APPENDIX E

Opinion of the United States District Court
(November 8, 1968, Weinstein, D. J.)

(Reported in 293 F. Supp. 156 (1968))

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH F. SCHIPANI,

Defendant.

No. 63-CR-237.

United States District Court
E.D. New York.

Nov. 8, 1968.

Net worth tax fraud case. The District Court, Weinstein, J., held that evidence established that taxpayer who had previously given information indicating lack of any cash accumulation and whose conduct during pre-indictment years indicated lack of cash hoard did not have cash hoard to meet living expenses during years covered by indictment, and that record in net worth tax fraud case established defendant's guilt beyond reasonable doubt.

Judgment accordingly.

* * *

Joseph P. Hoey, U. S. Atty., for the Eastern District of New York, Brooklyn, N. Y., for plaintiff; Eldon F. Hawley, Cono R. Namorato, Trial Attys., Dept. of Justice, Tax Division, Washington, D. C., of counsel.

Jacob P. Lefkowitz, New York City, for defendant.

Appendix E

OPINION

WEINSTEIN, District Judge.

I. DIFFERENCES BETWEEN FIRST AND SECOND TRIAL

This net worth tax fraud case covering the years 1956 through 1960 was tried before the Court essentially on the record of the first trial. The factual background is set out in the affirming opinion of the Court of Appeals. United States v. Schipani, 362 F. 2d 825 (2d Cir. 1966). See also United States v. Schipani, 289 F. Supp. 43 (E. D. N. Y. 1968), 44 F. R. D. 461 (E. D. N. Y. 1968).

[1] There are two major differences between this and the first trial. The government must now succeed by negating all non-taxable sources of income rather than by establishing particular sources. Evidence on the record relating to possible sources of income has been suppressed. See United States v. Schipani, 289 F. Supp. 43 (E. D. N. Y. 1968).

[2] The second difference is the applicability of the "presumption" relied upon by the government in the earlier phase of the case that the defendant, since he filed no tax return during the pre-indictment years, earned less than the minimum sum required for a tax return—five or six hundred dollars a year. Since he spent considerably more than these amounts, the government argued that he could have accumulated no net worth during this period. Such an inference is inconsistent with the factual pattern described below. It would beat the defendant's shield of the presumption of innocence into a sword for the government. The Court of Appeals frowned on this approach; the government may not use

it. United States v. Schipani, 362 F. 2d 825, 829-830 (2d Cir. 1966).

II. Availability of Cash Hoard

[3] The critical factual question in the case is whether defendant had acquired a cash hoard prior to the indictment period on which he might have lived during the indictment years. The Court concludes beyond a reasonable doubt that there was no such cash hoard.

In arriving at this conclusion, the following factors have been considered:

1. The government's thorough investigation which failed to uncover any traces of a prior accumulation.

2. The proven expenditures made by the defendant during the period 1943 through 1955 together with the inference that the defendant must have made additional expenditures for living expenses for himself and his family.

3. A series of events which corroborate the fact that the defendant had not accumulated any cash reserve:

(a) The defendant stated in 1943 in connection with an inquiry of prison authorities that he had assets of only $1,350.

(b) The defendant negotiated two loans during 1944 in the amount of $205.00. Such small loans are inconsistent with the existence of a cash accumulation. Undoubtedly, the defendant's $1,350 board had been depleted by his family's needs, requiring him to borrow small amounts to meet living expenses.

(c) In 1940, the defendant borrowed $51.59 from a life insurance company to pay a premium. The defendant made two small payments on the loan in 1942 and 1943, but did not repay the loan in full until 1947, when he made a final payment of $55.10. This event suggests that the defendant was in a precarious financial position from 1940 to at least 1947. The premium involved was relatively small yet the defendant could only make partial payments in 1942 and 1943, and did not complete the payment until approximately seven years after the premium was originally due.

(d) The defendant was delinquent in the payment of numerous premiums on his insurance policies. On many occasions it was necessary for the defendant to make application for reinstatement of a policy which was "out of benefit" because the defendant was more than thirty days late in the payment of a premium. In connection with three of his policies, the defendant was more than thirty days late in the payment of eighteen annual premiums, and he had to make repeated applications for reinstatement.

In addition to life insurance policies, the defendant also contracted for insurance on his boat and even arranged for fire insurance on the household effects of his son. He was obviously a firm believer in the benefits of all types of insurance coverage. An individual as intelligent as the defendant would not repeatedly fail to make premium payments within the thirty day grace period if he had an available cash accumulation. The amounts due were minimal, yet the premiums were repeatedly late, necessitating applications for reinstatement. Each application for reinstatement commenced the running of a new two year

"period of contestability." It is unlikely that anyone with a cash accumulation would voluntarily allow the grace period to lapse, thereby giving the insurance company an additional period within which it could contest a policy.

(e) In 1955, the defendant financed the purchase of a new car. He was often delinquent in the payment of monthly installments in 1955 and 1956, and, on at least two occasions, a late penalty was collected from him.

(f) In 1955, a default judgment in the amount of $64.05 was entered in an action brought by a health club against the defendant's wife to recover the sum of $46.00. The defendant subsequently paid $55.00 to an attorney in settlement of this judgment.

(g) The defendant made arrangements early in 1956 to mortgage his house in Long Beach, New York. The transaction was concluded in May, 1956, when the defendant received $10,000.00, less mortgage expenses. Defendant made arrangements to have the check which he received cashed immediately. He was delinquent in making several mortgage payments, and in 1957 he paid some $20.00 in late charges.

(h) In November, 1956, the defendant partially financed the purchase of a 1957 car. On one occasion, there was a delinquency in repaying this loan.

(i) In 1958, the defendant financed the purchase of jalousies and a boat.

A review of these events (3(a)-(i)) shows that the defendant repeatedly found difficulty in meeting his financial obligations. The conclusion is inescapable that the defendant had not accumulated a cash reserve during the pre-indictment period.

Appendix E

Many of defendant's transactions required installment payments. Since he had no checking account, each installment required the delivery of cash or an appearance at a bank to purchase a money order. If the defendant had had a cash accumulation it is unlikely that he would have chosen such inconvenient installment plans.

The exhaustive investigation conducted by the Treasury agents disclosed no visible assets other than those for which the defendant was given credit. If he had had other resources it seems unlikely that he would have hoarded them in the form of cash. Such an unproductive use for his funds seems inconsistent with his life style, his intelligence, the needs of his family and his abilities as revealed by the evidence. It is highly probable that had he had a sizeable cash hoard he would have invested it to get a return in the form of interest, dividends, rentals, or other profits. No such investments were found despite an extensive search. If they existed, the income from them would have been so large as to support the indictment.

Defendant's spending habits do not appear to be those of a retired person living on a prior accumulation. Rather, they appear to be the expenditures of a capable and aggressive person, confident that he could earn a living at his chosen field—whatever it was. His surrepitious method of using many small money orders rather than a checking account or substantial cash payments is inconsistent with the action of a citizen with a substantial nest egg of cash. It is reasonable to infer that this defendant met such current expenses as those for rent, insurance, taxes, utilities, cleaning, tuition, and doctors from current income.

Appendix E

III. Existence of Non-Taxable Income

[4, 5] When the net worth method of proof is used, the government must show either a "likely source of income" or must negate all possible non-taxable sources of the net worth increases. The Supreme Court, in the case of United States v. Massei, 355 U. S. 595, 78 S. Ct. 495, 2 L. Ed. 2d 517 (1958), stated the rule in a brief per curiam decision:

> "In *Holland* (348 U. S. 121, 75 S. Ct. 127, 99 L. Ed. 150) we held that proof of a likely source was 'sufficient' to convict in a net worth case where the Government did not negative all the possible non-taxable sources of the alleged net worth increase. This was not intended to imply that proof of a likely source was necessary in every case. On the contrary, should all possible sources of nontaxable income be negatived, there would be no necessity for proof of a likely source."

See also United States v. Schipani, 362 F. 2d 825, 830 (2d Cir. 1966); United States v. Ford, 237 F. 2d 57, 65 (2d Cir. 1956), rev'd on other grounds, 355 U. S. 38, 78 S. Ct. 114, 2 L. Ed. 2d 71 (1957) (per curiam). Sources on non-taxable income do not need to be negatived to a certainty. Proof of lack of such sources beyond a reasonable doubt is sufficient.

[6] Defendant's defense that his income during the indictment period may have been non-taxable proceeds from crime is untenable. C. I. R. v. Tellier, 383 U. S. 687, 691, 86 S. Ct. 1118, 16 L. Ed. 2d 185 (1966); James v. United States, 366 U. S. 213, 81 S. Ct. 1052, 6 L. Ed. 2d 246 (1961). The tax law "does not concern itself with

the lawfulness of the income that it taxes. Income from a criminal enterprise is taxed at a rate no higher and no lower than income from more conventional sources." C. I. R. v. Tellier, 383 U. S. 687, 691, 86 S. Ct. 1118, 1120 (1966).

[7] The government has satisfactorily negated non-taxable sources. During the thorough and intensive investigation conducted by the government, the following steps were undertaken in an attempt to ascertain whether the defendant had any non-taxable income:

1. The records of the Surrogate's Court in Kings County and New York County, covering the period 1932-1960, were checked for possible legacies from relatives of the defendant and his family.

2. The records of the Registrar's office in the counties of New York, Kings and Nassau were checked from 1940 through 1960 to determine whether the defendant or his wife had purchased or sold any real property, and whether they had given or received any mortgages.

3. The government made inquiry of forty banks in Brooklyn; thirty-two banks in Nassau County; five banks in Queens County; and seven banks in New York County. Three of the banks in New York County maintained central indices so that inquiry at a central location would provide information as to branch offices. The government attempted to locate: checking accounts; savings accounts; safe deposit boxes, opened or closed, in the name of the defendant or his wife; and any loans obtained by the defendant or his wife. In determining which banks to check the government took into consideration any leads

uncovered during the investigation. For example, any banks located in the vicinity of the defendant's residences in Brooklyn and Nassau or in other areas he frequented were contacted. In addition, any banks used by the defendant for the purchase of money orders or used by people who were in touch with the defendant were checked.

4. Inquiry was made at various finance companies in the New York area to determine whether any loans were obtained by the defendant or his wife.

5. Inquiry was made at the major credit bureaus and credit agencies in Brooklyn, Queens County, and Nassau County to determine whether any loans were obtained by the defendant or his wife.

6. Numerous friends and relatives of the defendant and his family were questioned to determine whether they had had any financial transactions with the defendant or his wife. Inquiry was made of all the defendant's living relatives, as well as more than seventy of the defendant's friends or acquaintances, who, the investigation indicated, were in contact with the defendant.

7. The records of the Brooklyn and Manhattan offices of the Internal Revenue Service were checked to ascertain whether any gift tax returns were filed by any of the defendant's relatives.

8. The records of the Treasury Department were checked to determine whether the defendant or his wife had purchased or cashed any United States Savings Bonds.

9. The government made inquiry of major insurance companies.

10. The government was in touch with thirty brokerage firms in New York.

11. The government checked retail stores and businesses in the defendant's neighborhood in an attempt to ascertain the amounts of goods and services he purchased.

12. Inquiry was made at the Nassau County Treasurer's office to ascertain the amounts of realty taxes paid by the defendant.

13. Numerous Internal Revenue district offices were contacted to ascertain if the defendant or his wife had filed tax returns.

14. Any leads obtained by the government during the investigation relating to the defendant's financial situation were diligently checked.

The Court of Appeals in reviewing the defendant's conviction after the first trial—and in this respect the evidence in both trials is identical—indicated that there had been sufficient negation of non-taxable sources of income:

> "The appellant has not on this appeal suggested any non-taxable sources other than a cash hoard, and it appears that the Government negatived all other reasonably possible sources from which Schipani could have acquired non-taxable funds. Under the circumstances, proof of a 'likely source' of net worth increases is not necessary. United States v. Massei, 355 U. S. 595, 78 S. Ct. 495, 2 L. Ed. 2d 517 (1958)."

Appendix E

United States v. Schipani, 362 F. 2d 825, 830 (2d Cir. 1966).

IV. Allocation of Income to Particular Years

[8, 9] In a tax evasion case, each offense must relate to a given tax year. When an increase in assets is apparent over a number of years, it is necessary to show year by year increases. Each year end then becomes the starting point for the succeeding year.

A review of the expenditures made by the defendant in the pre-indictment and indictment period reveal a gradual increase of expenditures over the years. They show a man living up to his full income. It is entirely reasonable to infer that defendant's income and expenditures were in close balance each year.

[10] While the indictment charged specific taxable income in dollars and cents—e.g., $13,280.06 during the calendar year 1956—it is enough to show that the defendant earned more than the amount required to file a tax return and pay a tax. The probability is that defendant earned more than the sums charged in the indictment, and that probability increases as the amount allegedly earned is reduced. For example, if it is 80% probable that the defendant earned $15,000 or more in any one year, it may become 90% probable that he earned more than $10,000 and 99% probable that he earned more than $5,000. The government has established beyond a reasonable doubt that the defendant earned substantially more than was required to make him liable to pay an income tax in each of the years 1956 to 1960.

Appendix E

V. WILLFULNESS

[11] The evidence in this case clearly supports the conclusion that the defendant wilfully attempted to evade and defeat income taxes for each year charged in the indictment. The following factors show a pattern consistent only with that of a guilty mind:

1. The defendant did not file any tax returns, nor did he pay any taxes during any of the indictment years.

2. In addition, the defendant attempted, by various devices, to conceal his income during those years. Among the means he used were the following:

(a) The defendant did not maintain any bank account during the indictment years, with the exception of three small trust accounts for his children, which he maintained in the name of his wife, despite the fact that he received substantial amounts of money during this period.

(b) The defendant maintained a safe deposit box at the Dime Savings Bank, in the name of Nancy Segreto.

(c) The defendant used currency to make payments during the indictment years. In 1956 he purchased $15,000 worth of furniture, which he paid for in cash (he had received $10,000 in cash that year from a mortgage on his home). He paid approximately $6,000 in cash in connection with his son's wedding. The defendant also used currency to make payments for living expenses during the indictment years, including rent in 1956-1960, mortgage payments in 1956, garage bills in 1957-1960, and medical expenses in 1957-1960.

(d) The defendant purchased money orders at various bank branches to make other payments during the indictment years. In making these payments, the defendant frequently signed someone else's name to the money order. Money orders used by the defendant between 1956 and 1960 were signed by him in the name of "Anne Scalfani" (the maiden name of his wife), "Joseph Dantuono," "Louis Esposito," "Mrs. J. Segreto," "Nancy Segreto," and "Stephen Uccardi."

(e) The defendant rarely purchased property in his own name. In 1955 and 1956 he purchased cars in the name of "Anne Scalfani." He apparently also used a false name, "J. Shippe," when he made arrangements for the delivery of one car.

In 1958, the defendant purchased a twenty-two foot Chris Craft boat in the name of "Louis Esposito." He posed as Louis Esposito in renting dock space in 1959.

During the years 1956 through 1958, the defendant frequently used a 1957 Buick, which was allegedly owned by Joseph Dantuono. The evidence in the case strongly suggests that the automobile actually belonged to the defendant, and that Dantuono was a nominal owner.

(f) The defendant attempted to conceal his sources of income during the indictment years by making false statements with respect to his occupation. In February, 1957, the defendant stated in an application for insurance that he was employed as a timekeeper and chief pay clerk at Universal Ship Scaling Company, and that he had been so employed for the preceding five years. In September, 1957, the defendant stated again, in an amendment to an application for insurance, that he was employed as a timekeeper by Universal Ship Scaling Company. In De-

cember, 1958, on his wife's hospital admission record, the defendant stated that he was employed as a timekeeper by National Ship Scaling Company.

These statements by the defendant concerning his occupation were false. National Ship Scaling Company went into bankruptcy in 1949, and was succeeded by the Universal Ship Scaling Company. Approximately one year later, in 1950 or 1951, Universal Ship Scaling Company also went out of business. Moreover, there is no record of such employment with the Social Security Administration.

The defendant also claimed, on a number of occasions in 1958, that he was employed by Riveredge Transportation and Storage Company as a "soliciter," or as a "salesman" and that he had been so employed for years. These statements were untrue. Neither the company nor the Social Security Administration has any record of the defendant's having been employed by Riveredge.

[12] Defendant's evasive conduct is strong proof of a guilty state of mind supporting a finding of wilful evasion. It also permits an inference that he had income which he was trying to conceal from the government. Behavior proving a guilty state of mind has been held sufficient to support a finding of guilt in a homicide case even where the dead man's body was never discovered. See Regina v. Onufrejczyk, 1 All. E. R. 247 (Ct. of Crim. App. 1955). As the Supreme Court noted in Spies v. United States, 317 U. S. 492, 499, 63 S. Ct. 364, 368, 87 L. Ed. 418 (1943):

> "affirmative willful attempt may be inferred from conduct such as keeping a double set of books, mak-

ing false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal."

VI. Alternative Hypotheses

[13] Net worth cases are merely special forms of litigation resting on circumstantial proof. There comes a point in such cases where the government's proof is so compelling that "the defendant remains quiet at his peril." Holland v. United States, 348 U. S. 121, 139, 75 S. Ct. 127, 137, 99 L. Ed. 150 (1954). This does not mean that the defendant has any burden to come forward with evidence. It means that when the evidence of the government becomes overwhelmingly persuasive the defendant runs the risk of the trier finding that the case has been proven beyond a reasonable doubt unless he can reduce its apparent probative force by producing contrary evidence.

[14] Alternative hypotheses of innocence might, of course, explain defendant's conduct. He may have acquired a large sum prior to the indictment period and lived on this alone. Touched with paranoia, or well founded fears of prior or current associates, or a desire not to invite the jealousy of ancient gods on himself or his family, or the desire to escape the importunings of relatives and organized charities, it is possible that this hypothetical lode was surreptitiously mined, this figmental mattress privately unstuffed, by this defendant.

Such explanations are simply unbelievable in view of the accused's character as clearly revealed by the evidence and confirmed by the Court's observation of the defendant during the course of this trial. He is in appearance, a distinguished middle-aged gentleman—grey haired, impeccably groomed, tanned, physically fit, and carrying himself with assurance and dignity. He responds intelligently and, in the courtroom setting politely. He has an apparently warm relationship with his wife and children as witness expenditures for their comfort and an extravagant wedding for his son. His siblings are loyal and close as indicated by their interest in his children when he was incarcerated. He enjoys clean fun as is shown by his membership in a health club and ownership of a fishing boat. He has close friends willing to lend their names as references and financial fronts. He is shrewd, calculating and rational as indicated by the details of his fiscal activities.

In short, the defendant's character does not permit the inference of misanthropic innocence. It confirms all of the evidence in the case pointing to guilt.

VII. Defendant's Physical Appearance

[15] The trier's observation of the non-witness defendant's demeanor and general appearance may be—and almost invariably is—considered by him in evaluating evidence introduced at the trial. See, e.g., Stein v. People of State of New York, 346 U. S. 156, 181, 73 S. Ct. 1077, 97 L. Ed. 1522 (1953) (trial judge and jury in better position than appellate court to determine if confession coerced by observing parties; defendants did not take stand); Morrison v. People of State of California, 291 U. S. 82, 94,

54 S. Ct. 281, 78 L. Ed. 664 (1934) (jury might find defendant was oriental even if he did not take stand); State v. McKinnon, 158 Iowa 619, 138 N. W. 523 (1912); Michael & Adler, Real Proof, 5 Vand. L. Rev. 344, 365 (1952). Michael and Adler succinctly summed up the law on this aspect of real proof when they wrote:

> "Demeanor, whether that of a witness while testifying or of a person who is not giving testimony, is * * * a kind of event * * * which occurs in the presence of a jury and is sensibly apparent to it. Consequently such an event need not be offered and cannot be excluded. The chief problem * * * is * * * estimation of * * * probative force." Michael & Adler, Real Proof, 5 Vand. L. Rev. 344, 365 (1952).

[16] In this case the conclusion that defendant was guilty beyond a reasonable doubt was reached solely on the record. Confirmation came from observation of the defendant in court. For whatever assistance it may give to the appellate court, the trial court finds that, were the evidence formally introduced insufficient to satisfy the government's burden of proof, the real proof would not save the government's case. Cf. Federal Deposit Ins. Corporation v. Siraco, 174 F. 2d 360, 363-364 (2d Cir. 1949); Rains v. Rains, 127 N. J. Eq. 328, 12 A. 2d 857, 860 (1940); Note, Replacing Finders of Fact—Judge, Juror, Administrative Hearing Officer, 68 Colum. L. Rev. 1317, 1327-29 (1968).

VIII. Conclusion

During each of the years charged in the indictment the defendant had substantial taxable income greatly in excess of six hundred dollars. During each of these years

he should have paid a substantial income tax. He failed to file income tax returns and concealed his income wilfully in order to defraud the government of income taxes due by him to the government. The government has proved beyond a reasonable doubt all the elements of the crime charged for each of the years charged in the indictment. The defendant is guilty as charged on all counts.

APPENDIX F

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 504

JOSEPH F. SCHIPANI, PETITIONER

v.

UNITED STATES OF AMERICA

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

After a non-jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on five counts charging him with willfully attempting to defeat and evade income taxation for the years 1956 through 1960. He was sentenced to three years' imprisonment and fined $12,500. The conviction was affirmed by the court of appeals. 362 F. 2d 825. A petition for a writ of certiorari was filed on August 29, 1966. The government filed a memorandum in opposition to the granting of the petition on September 30, 1966, and certiorari was denied by this Court on November 7, 1966. As yet no petition for rehearing has been filed, and under Rule 58(1) of this Court the time within which to file a petition for rehearing, if not extended, will expire on December 2, 1966.

239-871—66

In light of this Court's continuing jurisdiction over the cause, we submit this supplemental memorandum to advise the Court of the information set forth below and to suggest the appropriate disposition.

1. Petitioner kept no books, furnished no explanation of his failure to file returns and adduced no proof at trial. The government's proof was based on the net-worth method; the sufficiency of that proof to support the district court's findings was the primary issue presented by the petition. The facts developed at trial and the applicable law are set forth in the government's memorandum in opposition.

2. Since November 21, 1966, the following additional facts have come to the Solicitor General's attention:

(*a*) In response to a memorandum of October 24, 1966, from the Tax Division of the Department of Justice,[1] the Federal Bureau of Investigation informed the Acting Attorney General, by memorandum of October 28, 1966, that, although petitioner was not the subject of direct electronic surveillance by agents of the F.B.I., he was a participant in various conversations electronically monitored on a number of occasions in 1961. The microphone was installed, by means of a trespass, at a place of business where petitioner and others frequently met. It was believed by the F.B.I. that this establishment was being utilized for purposes connected with organized crime. The Federal Bureau of Investigation, acting on the basis of the Departmental authorization as previously

[1] The memorandum of October 24 was written in connection with the review program described in paragraph 4, *infra*.

described at pages 2–3 of the Supplemental Memorandum for the United States filed in *Black* v. *United States,* Oct. Term, 1965, No. 1029, approved the installation here in question.

(*b*) The substance of the monitored conversations involving petitioner and others was recorded in logs kept by the F.B.I. agents who conducted the electronic surveillance, and was reflected in various F.B.I. reports which came to the attention of those in charge of investigating and prosecuting petitioner for possible tax violations. The reports did not disclose the manner in which the information contained therein had been obtained. Following receipt of the F.B.I.'s memorandum of October 28, 1966, noted above, attorneys of the Department of Justice obtained the relevant F.B.I. logs and examined them in detail in order to make an informed judgment about the matter.

3. Unlike the situation in *Black* v. *United States,* we cannot say in the instant case that none of the evidence used by the government at petitioner's trial was obtained, either directly or indirectly, from an improper source. Some of the material in the F.B.I. reports (which were based in part on the electronic surveillance) provided investigatory leads and other information used in proceeding against petitioner. Since there was material evidence against petitioner which was tainted, his conviction cannot stand, and no purpose would be served here in having the district court conduct a collateral hearing, such as was suggested by

the government in its memorandum in *Black*.[2] We concede, moreover, that petitioner would have standing to object to the introduction of the evidence obtained as a result of the electronic surveillance. Although he was not the owner of the establishment under surveillance, he was at least an "invitee" on the premises within the meaning of *Jones* v. *United States*, 362 U.S. 257.

4. In view of this Court's supervisory role in the federal judicial system, the Department of Justice believes it appropriate to apprise the Court of its policy in regard to electronic surveillance of the kind here involved. Present governmental practice, adopted in July 1965 in conformity with the policy declared by the President on June 30, 1965, for the entire federal establishment, prohibits such electronic surveillance in all instances except those involving the collection of intelligence with respect to matters affecting national security. Such intelligence data will not be made available for prosecutorial purposes, and the specific authorization of the Attorney General must be obtained in each instance when the national security exception is sought to be invoked.[3]

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[2] Following the issuance of the Court's order denying certiorari in this case, the United States Attorney for the Eastern District of New York was advised not to have petitioner apprehended to commence serving his sentence, and petitioner has not in fact been incarcerated.

[3] A memorandum of the Acting Attorney General of November 3, 1966, addressed to all United States Attorneys, summarizes the Department's policy in this regard as follows:

> This Department must never proceed with any investigation or case which includes evidence illegally obtained or

Recognizing its obligation not to use evidence obtained in violation of a defendant's protected rights in any criminal prosecution, the Department has initiated a program to discover prior instances in which this may have occurred. An extensive review is presently being conducted in order to determine the instances in which there might have been monitoring affecting a case which has been brought to trial.[4] Reports of the results of this continuing review are being sent to the Acting Attorney General. Similarly, a careful review of pending and prospective prosecutions is being conducted by the Department for the purpose of determining what other cases might fall within this category. This will necessarily be a time-consuming process but will be diligently pursued to completion. The government will promptly notify the appropriate court when any material discovery is made.[5]

---

the fruits of that evidence. No investigation or case of that character shall go forward until such evidence and all of its fruits have been purged and we are in a position to assure ourselves and the court that there is no taint or unfairness. We must, also, scrupulously avoid any situation in which an intrusion into a confidential relationship would deny a fair hearing to a defendant or person under investigation.

[4] As the instant case illustrates, problems in this regard may still arise in cases in which some investigation was conducted prior to July 1965.

[5] Action similar to that taken in the *Black* case and in this case has been taken by the government in *DeNiro, et al.* v. *United States*, pending on appeal, Nos. 17,053-17,055, C.A. 6, where the government suggested that the Sixth Circuit remand the cases to the district court.

5. In light of the foregoing, and in view of this Court's decision and *per curiam* opinion in the *Black* case, we suggest that the Court vacate its order denying certiorari, grant certiorari, vacate the judgment of the court of appeals, and remand the cause to the district court for a new trial, should the government seek to prosecute petitioner anew.[6]

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

NOVEMBER 1966.

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[6] On November 29, 1966, while preparing to file this memorandum, we learned that agents of the Alcohol and Tobacco Tax Division of the Treasury Department had engaged in electronic surveillance of another establishment frequented by petitioner. Logs were not maintained and we are unable at this juncture to provide a full statement of the relevant facts. Although our information is incomplete, it appears that the surveillance lasted for a brief period and that no relevant information relating to petitioner was obtained. Investigation of this matter will be continued and no further prosecution of petitioner will be instituted in advance of its completion. Since, however, the facts stated in the text of this memorandum call, without more, for the disposition which we are suggesting, we are filing the memorandum without further delay. In the event that the government should seek to proceed further against petitioner, all additional information which we obtain will be made known to the district court.

U.S. GOVERNMENT PRINTING OFFICE: 1966

APPENDIX G

Memorandum of James D. O'Brien, November 18, 1966

Government Exhibit 15

November 18, 1966
JDO:amz
5-52-9123

Mr. Mitchell Rogovin
Assistant Attorney General
Tax Division

James D. O'Brien
Assistant Chief, Criminal Section
Joseph Frank Schipani
(ED New York)

In response to your memorandum of October 24, 1966, the Director, FBI, informed the Acting Attornel General by memorandum of October 28, 1966, that the captioned defendant was not the subject of direct electronic surveillance coverage but that he was a participant in conversations electronically monitored on a number of occasions in 1961. The microphone coverage was on Prisco Travel Bureau, 1 DeKalb Avenue, Brooklyn, New York, a meeting place of racket figures, during the period January 10, 1961, to January 31, 1963. The memorandum went on to state that the information on Schipani was not disseminated to the Internal Revenue Service.

Schipani was convicted on October 15, 1965, on income tax evasion charges for the years 1956-1960, inclusive. He was fined $12,500 and sentenced to three years imprisonment. Certiorari was denied on November 7, 1966. Proof

Government Exhibit 15

was by the net worth plus nondeductible expenditures method.

At your request, I have received and read five volumes of logs from the FBI involving Schipani which are the products of the aforesaid electronic surveillance. I have also reviewed the Criminal Division's office files and ATU case reports on Schipani. I have also reviewd the trial court's findings of facts.

The "subject" of the monitoring was one *Michelino Clemente* who appears to have kept the shop, to speak, at the Prisco Travel Bureau; the device was apparently in his office, and Schipani was a frequent visitor. It is obvious from the conversations that *Clemente, Schipani* and others have mutual business interests and that the travel bureau is a "front" for their activities.

The question, of course, is whether the evidence for our conviction of *Schipani* on income tax charges was tainted. Before going into the investigative chronology and procedures, it may be well to review the nature of the method of proof employed which is explained in detail in *Holland v. United States,* 348 U. S. 121, and in three other net worth cases reported in that same volume. As a man's net worth is the difference between his assets and his liabilities at a given date and the inference of unreported income comes about by a comparison, under certain circumstances, of his reported income with his increases in net worth plus nondeductible expenditures, the method actually encompasses his entire financial history during the period covered by the computations. The "circumstances" which must be coupled with net worth increases in excess of reported income are either (1) a "likely source" of taxable income, as in *Holland,* or (2) the pre-

clusion of all nontaxable sources (see *United States* v. *Massei*, 355 U. S. 595, and *United States* v. *Adonis*, 221 F. 2d 717 (C.A. 3d)). However, the guidelines for the so-called *Massei*-type case are not yet clear because the Supreme Court in a short *per curiam* merely said that proof of a "likely source" is not indispensable.

Thus, in a net worth-expenditure case, everything which relates to the financial condition or enterprises of the defendant during the period under examination is material. And there is the doctrine of the duty to explore "leads" advanced by the taxpayer (see *Holland, supra*) and the "projection" of what view a court might take of leads in the possession of the Government not voluntarily advanced by the taxpayer. A copy of the trial court's findings in the *Schipani* case is found in Section 2 of the DJ file. "Likely sources" of the defendant's income during the indictment years were found to be an interest in a restaurant business and services as a go-between in labor relations of employers with unions. In footnotes 15 and 16 the trial court discussed the "source" of evidence. Particular note should be made of the *Casa Bianca* restaurant and the reference to "scattered bits of testimony (which) strongly suggest the ownership by defendant . . . or at least an interest in it, as a likely source of his income."

In the context of electronic surveillance which extended from January 10, 1961, to January 31, 1963, in which conversations of Schipani were monitored, the report of February 20, 1963, of I.R.S. Special Agents Masetti and Wynne on the income tax case states that their investigation was initiated as a result of a memorandum dated April 26, 1961, referred by their Chief of Intelligence,

Government Exhibit 15

Brooklyn, relaying an "earlier" request from the Attorney General's office to conduct an investigation of Schipani. The report also stated (p. 1) that Schipani "is reputed to be engaged in such nefarious activities as bookmaking and gambling and who, it has been alleged, was a controlling factor in the garbage carting industry in Brooklyn, and who had an undisclosed interest in a restaurant . . . ."

The first monitored conversation of Schipani (Log for March 2, 1961) dealt with general mob problems and a Puerto Rican sweepstakes deal. Clemente and Schipani also discussed going into the garbage carting business in partners with one Al Capone who later joined them and left with Schipani. One comment quoted in full in addendum, p. 122, was to the effect that Schipani had 50 percent of Moe (thought to be Murray Postman, Executive Board member of Local 222, affiliated with the International Products Service and Sales Employees, Brooklyn). Further in the conversation Schipani referred to Ben Ladner, who the log states (p. 121, addendum) is an accountant who "represents Schipani in his union business and in the operation of the Casa Bianca Bar and Restaurant, Brooklyn." Schipani, Clemente, and Capone discussed formation of a corporation in connection with the garbage cartage business.

In the log for August 7, 1961, Schipani and Clemente discuss the carting business further. Later on, they complain of the surveillance they are under. During the conversation, Schipani said that "four cars" had been on him; that he had a call from I.R.S. Intelligence; that there is a kid who told him Bob Kennedy wanted a report on him every two weeks; that the "kid's" father was with I.R.S.

Government Exhibit 15

Clemente states that his son-in-law in Central Intelligence Bureau (sic) who says Schipani is clean with them but that the FBI is out to "grab" him. The conversation was a long one and many names came up. In the log for September 12, 1961, Clemente entered the office with Schipani and one Miltie Dillinger. The carting business is discussed. Clemente told Schipani that they should have bought out the Casa Bianca and run it themselves. Schipani disagreed. (If, as the Government has maintained, Schipani owned a "piece" of the Casa Bianca, then this would refer to the rest of it.)

In the log for September 19, 1961, in a conversation in which Schipani participated, Hank Prisco said that "Charlie has a good connection with customs", to which Clemente responded that he was surprised his brother had got involved with "this guy." The log for November 2, 1961, records a conversation of Schipani and Clemente concerning Capone and a garbage account. In the log for December 19, 1961, Clemente discussed the garbage business further with Joe Schipani and Capone. As Schipani leaves they arrange to meet at the "Casa", with Schipani saying he would not use his car as "they usually sit on my car".

The Criminal Division's correspondence file shows a memorandum from Phil Wilens to Hundley, dated January 31, 1961, referring to what an FBI report shows on Schipani, stating that he reputedly had an interest in the Casa Bianca, that his wife had an interest in Guiney's Inn and On the Brink of the Beach and that an investigation should be made by IRS and ATU.

By letter of February 7, 1961, Silberling wrote Alan Long relaying the request of the Attorney General for an

investigation of Schipani re possible wagering tax violations.

In a letter dated February 14, 1961, Hundley wrote Avis of ATU asking investigation of possible False Forms 11 and related the possible undisclosed interest in Casa Bianca, Guiney's Inn, On the Brink of the Beach, Montauk Point and relaying the request of the Attorney General for an investigation. This letter requested reciprocity of information between the Criminal Division, the FBI and ATU.

(The ATU case report, p. 13, states that Joseph Schipani was observed spending much time at the Casa Bianca; eating without paying, etc.; that he was reputed to be the owner; that information was received during the summer of 1961 that Schipani wanted to sell his undisclosed interest and that surveillance of Schipani in September 1961 revealed a meeting at Oscar's Bar on September 25, 1961, at which an envelope changed hands. In its synopsis (p. 3), the report said "conclusions based on the most reliable type of information and on the extensive investigative effort expended" indicate that he is actively engaged in (1) gambling, (2) garbage collection organization, (3) union-labor organization, (4) other underworld matters.)

By letter of March 14, 1961, Alan Long reported to Silberling attaching a copy of a report of March 9, 1961. (A page was attached signed by one Joseph Delfino, probably an agent, saying that Schipani was alleged to be owner of the Casa Bianca.) By memo of April 7, 1961, Special Agent William Tarangelo (I.R.S.) gave proposed work plan for the wagering tax investigation, inter alia the "examination of the files of all investigative agencies

Government Exhibit 15

regarding the subject"; equipment to include Fargo F-600 kit (electronic equipment); camera with photo lens; and a minifon.

By letter of April 14, 1961, Avis told Hundley of a memo report from Special Investigator Sparago reporting certain collateral information which he had from a "confidential informant" on Schipani's activities. By memo of May 22, 1961, Shur (OCR Section) to Silberling, it was stated that investigation was now underway by ATU, FBI and I.R.S. for various offenses, including income tax violations.

In a handwritten note of May 14, 1962, All Masetti (the senior Special Agent on the income tax case) to "Dan": "In case you talk to O'Hara (NYC Intelligence co-ordinator) re cooperation with FBI—I received a call from Ralph DeSenna today." A note at the bottom of the page says "Relayed same to O'Hara" and a note apparently by Shur (CS) as of 5/15 that "I contacted FBI (NY) and was advised by Mansfield saturation would start soon and any leads to garbage industry would be checked out."

Special Agent Masetti related that he took over the income tax investigation from Tarangelo and stated in his bi-weekly report covering May 1, 1961—May 12, 1961 that he had reviewed Tarangelo's materials, including transcripts of files of Narcotics Bureau, ATU, and FBI and that "information from the foregoing sources indicated that Schipani may have financial interests in several taverns and restaurants." In a memo from Shur to Silberling dated May 29, 1961, Shur said the last FBI report was 10/10/60 but this obviously referred only to a report on *Schipani* as he also referred to an FBI report dated

Government Exhibit 15

May 3, 1961, on *Clemente,* the subject of the electronic surveillance. Special Agent Donavan (apparently of the FBI), according to Shur, stated Shur would receive periodic intelligence reports and recommended that the I.R.S. continue with the investigation of the cartage association as it did not involve crossing state lines. Shur also referred to what Donavan told him concerning Schipani in the garbage collecting business and that Schipani was a Profaci man. He quoted the 5/3/61 report of the FBI on Clemente.

In his bi-weekly report (5/15/61-5/26/61), Special Agent Masetti (I.R.S.) said he would arrange to secure information from the files of the FBI.

In a letter of June 9, 1961, from Silberling to Avis of ATU, Silberling said it had come to their attention that Benny Ladner, listed as a witness in SAR, (and others) and Schipani were partners in Casa Bianca; that "it had been reported that Michelino Clemente has been attempting to purchase Casa Bianca over a period of several months and has been dealing with Schipani." In a memo, Shur reported (7/12/61) on a field trip on the case in which he talked to agents of the different agencies.

By letter of July 17, 1961, Mr. Miller asked Mr. Caplin for a "saturation investigation" because of information "supplied us by other investigative agencies." Another letter (10/19/61) to Alan Long gave full report on Schipani and said "the following information was obtained from recent reports of the FBI" and referred to the Casa Bianca and the report that Schipani controlled the garbage disposal unions in Brooklyn.

The FBI reports often parrot almost verbatim what was overheard by means of the electronic surveillance of

Government Exhibit 15

Clemente and Schipani, e.g., in the report of Agent Michael J. Nicholas of June 16, 1961, p. 2, in Criminal Division correspondence file, states:

> "NY T-3, on *March 2 1961,* advised that the subject (meaning Schipani) contemplated opening a carting business with Michelino Clemente and one Al Capone in the New York area. The informant advised that the firm will be operated by Capone and the subject would remain on the sidelines with only his money invested in the operation." Cf. log of same date already summarized.

From the foregoing it can be seen that during the period in which the Schipani tax case was investigated the Government achieved the rare objective of complete interchange of information between three investigative agencies and the Department of Justice. Unfortunately, much of it was tainted.

I do not see how we can support the conviction thus obtained of Schipani on income tax evasion charges. The nature of the proof is such that I would have little hope of ever perfecting a taint-free case. However, I would be reluctant to recommend outright dismissal of the indictment at this point without a more painstaking examination of the evidence available in the case. For example, it should be noted that the report of FBI Agent John Edward Shedd, dated October 10, 1960, p. 17, well before the installation of the bug, stated that Schipani might be the owner of the Casa Bianca Restaurant through a nominee. Further, in the Court's findings of facts on "likely source" some pieces of evidence are not necessarily tainted; e.g., his son had listed Schipani as a "restauran-

teur" on a fidelity bond, testified that, in filling out an application for employment, in which he stated his father's firm was the Casa Bianca, his father has so instructed him. Other witnesses on source cannot be traced to the "bug". But, in view of the fact that three Government agencies were, apparently, keeping a personal surveillance of the defendant, it would be difficult to convince a court that anything we have is free from taint.

As you will have noted in reading the foregoing, there are also personnel problems raised by alleged associations by these people with persons (1) in I.R.S., (2) C.I.A., and (3) Customs.

Note: Even as an "invitee", Schipani would have "standing". See *Jones* v. *United States*, 362 U. S. 257. But the logs indicate he was more than an invitee; he was in business with the people whose "front" the travel agency was, so that in a sense it was his "front" too.

APPENDIX H

Judgment of Court of Appeals Affirming Conviction

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of August one thousand nine hundred and sixty-nine

Present:

HON. PAUL R. HAYS,
HON. WILFRED FEINBERG,
Circuit Judges.
HON. WILLIAM F. JAMESON,
District Judge.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH F. SCHIPANI,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

Appendix H

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

APPENDIX I

Order of Court of Appeals Denying Motion Under 28 U.S.C. §1651

33753

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

JOSEPH F. SCHIPANI,

Petitioner,

v.

HON. JACK B. WEINSTEIN, United States District Judge for the Eastern District of New York,

Respondent.

A petition for a writ of mandamus or writ of prohibition or other writ having been filed,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

Before:

HON. PAUL R. HAYS,
HON. WILFRED FEINBERG,
Circuit Judges,
HON. WILLIAM J. JAMESON,
District Judge.

June 25, 1969